SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

UPCOMING SOUTH COAST HOA MEETING–OCTOBER 21
Financial Issues for HOAs

At the May 2013 meeting and also via email after the meeting, we solicited member input regarding future program topics. Five pages of notes later, we will attempt to make some of those suggestions a reality. This meeting will focus on financial considerations and concerns that associations face from the following speakers:

Gayle C. Cagianut, CPA of Newport, Washington. Gayle started her association accounting practice in Oak View, CA and is well known in Southern California as a speaker and writer on all things related to association accounting. Since 'retiring' to Washington several years ago, she started a practice there covering the entire state. Her presentation will be on "Top Ten" – what board members should know to manage financial affairs of your communities.

Les Weinberg, RS – Reserve Studies, Inc of Chatsworth, CA. Les and his company have over 20 years experience in the preparation of HOA reserve studies. His company is a South Coast member and he is a frequent meeting attendee. Topics that will be addressed include: Maintenance deficiencies seen during inspections; the impact of "zero" interest rates on reserve funding, how important is it for the board to stay within or to implement the recommendations in the reserve study and the need for even the smallest associations to have a reserve study and funding plan.

Michael J. Gartzke, CPA of Goleta, CA. Mike is a co-founder of South Coast HOA and has worked with area associations since 1982. Mike will provide an update to the financial data and trends that he has seen in local associations since he first put a database together eight

years ago. Many associations have found the data useful in comparing and contrasting their financial operations with other associations in the area.

Date – Monday, October 21, 2013
Time – 7 PM
Place - Encina Royale Clubhouse - 250 Moreton Bay Lane, Goleta (Fairview exit North from 101)

Light refreshments will be served starting at 6:45

COMING SOON – A REDESIGNED WWW.SOUTHCOASTHOA.ORG WEBSITE!

Plans are underway to set up an entirely new site with archived newsletters and materials from previous meetings and seminars. Also, we will post our upcoming meeting notices and links to other sites containing valuable guidance and information for you. Watch for the announcement!

MARK YOUR CALENDARS – DAVIS-STIRLING REWRITE MEETING

Mr. Adrian Adams of Adams Kessler, PLC (www.davis-stirling.com) in Los Angeles will make a presentation on the totally rewritten Davis-Stirling Act that was passed by the legislature in 2012 but is coming effective January 1, 2014. This act is the primary law governing homeowner association operations in California. The law has been reorganized and renumbered and in some cases, substantial changes have been made in the law.

Date – Monday, November 18, 2013
Time – 7 PM
Place – Encina Royale Clubhouse – 250 Moreton Bay Lane, Goleta

DOES THE DATE JANUARY 1, 2014, OR THE REORGANIZED DAVIS STIRLING ACT FRIGHTEN YOU? IT SHOULDN'T

By: Beth A. Grimm, HOA Attorney

Editor's Note: As many of you know, Beth is a frequent contributor to South Coast HOA through her articles as well as meeting presentations. She has written extensively on the rewrite of the Davis-Stirling Act, first codified in the mid-1980s and the recodification effective in 2014. We are having a meeting on this subject with attorney Adrian Adams on Monday, November 18. See information above. In the meantime, we need to start getting up to speed with the new law. Beth's contact information follows in the Professional Sponsor listings.

What is more frightening than the looming date of January 1, 2014, when the ***new, improved, reorganized, restated*** **Davis Stirling Common Interest Development Act** takes effect, is the excessive number of homeowner associations in the state that are trying to function with severely outdated documents, suspended status as corporations, and little to no understanding

about the importance of a modicum of knowledge about the Act itself! Maybe all of the hubbub about the ***new Act*** will help with that. Like the coming of the new millennium on January 1, 2000, some people are freaked out. Others don't even know about it, and most that do are simply concerned. Concern is healthy. It makes people pay attention. It will take some patience and time to bring everyone up to speed. But you can start the transition now, and in a meaningful way.

The best way to help managers, boards, and owners is probably to provide answers to questions floating around the State of California. So here goes:

What will happen to our association on January 1, 2014 if we are not ready? Will our documents expire when the current Davis Stirling Act at Civil Code Sections 1350-1378 expires? Will our status as a CID terminate?

Nothing drastic will happen. No document will expire unless by its own terms it says so. The new Civil Code Section **4010** says "Nothing in the act that added this part shall be construed to invalidate a document prepared or action taken before January 1, 2014, if the document or action was proper under the law governing common interest developments at the time that the document was prepared or the action was taken." This means that if your documents are legal and enforceable now, they will also be after January 1, 2014. If they conflict with the law now, they will remain in conflict as the year rolls over. The law itself will not change drastically enough to make your heart speed up in anticipation of the end of the year. Neither existing documents nor your association will die or become irrelevant. While there are benefits to start thinking "transition", there is no legal requirement to do so. The purpose of this article is to suggest simple ways to incorporate the new Act into existing documents so the transition will be a breeze and your December holidays will not be disrupted.

Will our current CC&Rs and Bylaws need to be updated and restated because of the new Davis Stirling Act?

Not necessarily. If they are outdated today in 2013, they will be just as outdated on January 1, 2014, and will probably seem even moreso. Documents that are not outdated now in 2013 will not immediately become outdated just because the Act is moved to another section of the Civil Code and there are a few new twists. The new Civil Code Section **4235** allows boards to make changes to update documents by ***changing statute numbers*** from the 2013 code to the 2014 code. It says, "… the board may amend the governing documents, ***solely to correct the cross-reference***, by adopting a board resolution that shows the correction."… [and] … "Member approval is not required in order to adopt a resolution pursuant to this section." [Author's emphasis.] So a board could restate its CC&Rs (or recorded Declaration) with the new code sections and record them along with the Resolution. Note the word "solely" though. It's important. Association boards ***should not go rewriting any text in the documents.***

Some people are telling us that we (the board) should just wait and restate our documents after 1/1/2014 since the new law allows us to, without an attorney or membership approval. Can't we just have our manager or a committee rewrite our documents under this new authority?

"Some people" are misleading association boards. A board may not rewrite its documents without membership approval. Free rein can lead a runaway board down a precarious path.

This is where the word "solely" becomes important, and I cannot stress it enough. No board should go crazy and start revising the association documents. It is important to stop, think, and get good professional advice before doing anything to modify documents. The law allows only for replacing statute numbers, not rewriting paragraphs. Consider this - is it really beneficial to carve up documents to insert 3 to 4 times the ***number of numbers*** in the documents? That is what it would take to reflect the new Act in a set of old documents. There is a better way.

So what do we do about CC&Rs and Bylaws that point to the "old" law?

Use conversion charts! Respect the KIS principle – Keep it Simple! Conversion charts are gold for updating documents for a smooth transition from 2013 to 2014. Look around, there are lots available. The California Law revision Commission (CLRC) responsible for rewriting and relocating the Act and breaking down the long statutes into [what they saw as] understandable "paragraph bites" has a conversion chart on its website (www.clrc.ca.gov). Lots of attorneys also have posted conversion charts for the taking on their websites. My own website will have links to various charts soon. CACM, ECHO and CAI Chapters offer charts. Just beware of a couple of things. Some charts have incorrect cross references, some have omissions, and few contain accurate subject headings. The CLRC specifically left subject references and titles out of the new law and one particularly important omission incorporating other laws is discussed in more detail below. These published charts are very long and useful for general cross-referencing, but are not as useful as attachments to update documents because of their over-inclusion.

In adjusting documents and policies for transition, you need only those cross-references for pertinent statutes already listed in the document. Appropriate attachment and incorporation of a relevant conversion chart to almost any document can make the transition from 2013-2014 very smooth.

So when exactly do we "transition" or "convert" documents?

Starting anytime this year (2013) to work toward transition is good (not necessary though it feels like it with all the hype surrounding the coming of the ***new Act)***, and use of conversion charts as described provides a flexible way to transition into 2014. If, as has happened in some cases, an association changes a document now to reflect the 2014 law without any cross reference to existing law, it causes confusion because the new law is not effective until 1/1/2014. .

What about our disclosures sent out this year for the fiscal year 2014, do they have to be consistent with the new law?

The annual disclosures sent out to members between now and the end of the year don't have to reflect the 2014 law because 2014 is not here yet and any parts to the package that a board wants to amend can be accomplished in 2014. The financial requirements (Annual Budget Report) do not change 2013 to 2014. It is the policy side of things that will change, and not that drastically. It always makes sense to be prepared and that can include adjusting policies and documents at the soonest opportunity by adoption of and inclusion of the helpful summarized conversion charts. Below are some areas that can be addressed in an upcoming 2013 disclosure package to minimize any need to revamp any part of the package and need to send an addendum in 2014.

What are the annual disclosure package changes going to be and what can we do now?

Revamp Policies and/or Rules: Just like working with flexing the governing documents, a board can be proactive with policies and rules. For example, the Collections Policy can be revamped by including a conversion chart at the end showing these columns: The 2013 code # / The corresponding 2014 code #s / The subject matter headings.

This can be accomplished by preparing the summary chart and attaching it to the policy or rule, and formally re-adopting it by board action. In many cases code numbers that appear in the text of the policy or rule can be eliminated, ***if the subject matter is identified on the conversion chart so one can easily locate the proper code reference***. The law did not change as to the wording relating to collections, just the code numbers, so the Board can make this change officially by motion and approval at a board meeting without sending the policies out for owner comment or delaying action. The same applies to the fining policy – which by the way - as of 1/1/2014 - will be required as part of the annual disclosure packet. The same applies to any enforcement, IDR or ADR policy, changes can be made to reflect cross-references to code numbers without pre-board-adoption owner comment.

Rearrange the Annual Package:

Financial Portion (New Civil Code Section 5300): The new ***Davis Stirling Act*** reorganization of the annual disclosure package for owners makes a lot of sense. It breakes the package down to two sections: financial and policy. The "Annual Budget Report" portion of the annual disclosure package contains the financial information such as the budget, reserves information including the study with the component list and funding plan, and the detailed worksheet containing the statements about how shortfalls in funding will be met in the coming years. The budget report also includes the information about insurance coverage and association loans. None of these items is new; they just going to be found under new statute numbers. A summary conversion chart can be made up for the Annual Budget Report, showing the corresponding cross-reference to statutes and subject. Again, a board does not need to include the entire conversion chart covering all of the statutes of the **Davis Stirling Act**. It's just too cumbersome. It is more work to prepare a summary chart, but much more useful if it is unencumbered by extraneous references.

Policy Portion (New Civil Code Section 5310): The second part of the annual disclosure package is called the "**Annual Policy Statement**". This portion includes the association policies that must be circulated. The only *policy addition* to 2013 requirements is the Fine Schedule, Enforcement Policy, or as it is called in the statute, the "discipline" policy. Any of these items can be refined with the summary conversion chart listed at the end, showing the 2013 law / 2014 corresponding laws / and subject matter. There are a few other additions to the annual policy aspect of the association. The law says Boards must provide owners the contact information for the Association. Most boards have been doing this anyway by providing the name and address for the management company or the board secretary. And boards that did not provide this kind of information in the past left owners to their own devices, like handing items to the board president at the swimming pool or coming to a director's home during dinner time and knocking on the door. Other new information to be included in this annual policy statement includes a statement that a member may request to have notices sent to up to 2 addresses, the general location for posting general meeting notices, and the option for the

member to receive these general notices by individual delivery (which is intended to be helpful to owners who live off-site).

Currently disclosure package items, which remain the same in 2014, are collection policies, dispute resolution summaries, how to obtain minutes, where overnight payments of assessments can be made, and architectural process policies.

May we send out notices by email to owners in 2014 without their consent?

Boards may send out email notices to owners when owners provide their addresses. However, there is a distinction between just sending an email notice and expecting that notice to satisfy legal notice requirements specifically calling for other methods of delivery such as mailed notices. An owner's written consent to receive notice by email *is still required if a board is trying to satisfy a legal requirement to "distribute" notice which is the case for distribution of the annual disclosure packet.* The consent form for giving permission should make it clear to the member what they are agreeing to receive by email. And the new law says that any record or document provided by email must be capable of printing and retention by the recipient. (**New Civil Code Section 4055**). In the new law there are 3 specific types of notices laid out. Adopting a full-fledged Notice Policy and including it in your annual disclosure package this year makes a lot of sense, to get the jump on next year, and to provide items will eventually have to be included in the annual package anyway. If you stick to the law, no owner comment period is required. Here are the new categories:

NOTICE TO THE ASSOCIATION [New Civil Code Section 4035]: The board will have to provide association contact information as described above. If there is a "Notice Policy" adopted and included in the annual disclosure package, it could cover a lot of ground, including the various new required "notices" like stating that if an owner wants to request 2 mailing addresses, opt out of the membership list, or ask for individual notice of general association notices, the owner has to submit a written request to the Association's contact person listed. Thus, an official Notice Policy could cover 5 of the new requirements and provide a useful educational tool for new and future board members and managers.

NOTICES TO MEMBERS: There are two types of notices to members – those items requiring **individual delivery [New Civil Code Section 4040]** which means delivery to the individual member directly, like hearing notices and disclosure packages; and those satisfied by **general delivery [New Civil Code Section 4045]** which means items sent out to all members or posted for general information purposes, like meeting notices and announcements.

A forward thinking board could add a tear off or separate form to be circulated with a "Notice Policy" asking members to complete and return it, allowing members to indicate whether they want to opt out of the membership list, have items mailed to dual addresses, give consent to email delivery, and if you add blanks to include emergency information, it might enhance the ability to collect critical and important information the board needs to have on file. Asking for completion of such a form fulfills many purposes.

New Civil Code Section 4050 is added which says that if delivery involves mailing of a document, it is "deemed" to be complete on deposit in the US mail, clarifying an ongoing question as to whether there is any 5 day rule about when the time starts to accrue for timing a mailing.

Additional Notable Aspects of the Reorganized Act:

In order to avoid a 10 page article, I am summarizing a few of the remaining noteworthy highlights of the ***new Act***. For the most part, the material provisions of the old Act were carried to the New Act and much of the wording remains the same. The intent of the CLRC was not to change the law, but to restate it in terms the average person could understand, to bring laws applying to property use from other sections of the law into the ***Davis Stirling Act***, and to break up run-on sections that had become cumbersome. These are some of those changes:

Civil Code Section 4205 (hierarchy) provides a legal statement of hierarchy in the association documents. At a minimum, it is good for boards and managers to know the law controls if it says "notwithstanding" referring to other documents. The documents control if the law says: "Unless the document says" referring to the document as the authority. And with regard to subjects of most interest to owners, such as regulations on property use, the recorded CC&Rs control over the other governing documents.

Civil Code Section 5350 (director conflicts) specifically prohibits directors from voting [with regard to board actions] on specific decisions that directly affect the director such as disciplinary action, an assessment for damage to the common area, an architectural application, or a transfer of common area for exclusive use.

Civil Code Section 4700 (several property use related codes) directly references statutes from other areas of the law that regulate the use of a member's separate interest. It is the complete impact of this one new law that is commonly inadequately explained on conversion charts. It is essential that it be properly addressed in such summary charts as those made for CC&Rs and policies that address the various topics, as follows: (listed in order as set forth in **New Civil Code Section 4700:** (a) Civil Code 712 and 713 relating to the display of signs, (b) Civil Code 714 and 714.1, relating to solar energy systems; (c) Civil Code 714.5, relating to modular homes, (d) Civil Code 782, 782.5, and 6150, and Section 12956.1 of the Government Code, relating to racial restrictions; (e) Section 12927 of the Government Code, relating to the modification of property to accommodate a disability; and (f) Section 1597.40 of the Health and Safety Code, relating to the operation of a family day care home.

These are the highlights of the new Davis Stirling Act and this information should help homeowner associations in California prepare for the big transition.

BANK ACCOUNTS, CERTIFICATES OF DEPOSIT, ARE YOUR BALANCES AND SIGNATURE CARDS UP TO DATE?

By: Michael J. Gartzke, CPA

Associations usually have multiple bank accounts. There is an operating checking account, a reserve fund checking account, perhaps a money market reserve account and for associations with additional reserves, certificates of deposit (CDs) and/or brokerage accounts.

When FDIC Insurance was only $100,000 and interest rates actually allowed associations to earn some interest on their reserve funds, some associations purchased CDs from multiple banks to maintain full FDIC insurance on association funds. Some (but not all) CC&Rs require this coverage. When the financial markets collapsed five years ago, here are some of the things that occurred:

- Interest rates on cash fell to historically low levels. In order to obtain 1% annual interest rate on a CD today, you may have to obtain a 2-year or longer term. Investing in a 5-ear treasury note currently pays 1.7% while a 10-year note pays 2.9%. These treasury rates are actually a full percentage point more than they were a year ago.

- FDIC Insurance increased to $250,000 per association (not per account) per financial institution. While initially a temporary increase, the coverage has been made permanent. This allows associations with higher reserves to maintain FDIC insurance coverage using fewer banks.

- Numerous banks merged into other banks (Washington Mutual into Chase, Countrywide into Bank of America, Downey Savings into US Bank and most recently Santa Barbara Bank and Trust into Union Bank, just to name a few). In some cases, accounts were converted to lower interest rate accounts or no interest rate accounts as part of the merger.

- To save costs, some banks are no longer providing a calendar year-end balance statement for their CD accounts. While they send out the IRS-required 1099 for interest earnings (if greater than $10), the only other document that many send now is a renewal notice. The 1099 does not show a year-end balance in the account.

- Board and managers (and the rest of us) became apathetic about increasing yields on funds when options were sparse. So CDs were just allowed to roll over and little rate shopping was done.

- Board members changed, property managers changed and mailing addresses changed for some associations. Mail with old mailing addresses was not forwarded. Notices regarding CD renewals and other correspondence from banks were not received by the association.

- With increased privacy laws and banking regulations, banks will not talk to anyone besides a signer on the account. They won't talk to the manager. They won't talk to new board members and they won't talk to the association's CPA.

Now would be a good time to take stock of all the association's bank accounts and determine who the signers are on each and every account. You may find that the association may not have any current board members listed as signers on their certificates of deposit, brokerage accounts or accounts that they have had for a long time. Find out what the bank requires. It may be a letter from the board secretary that is noted in the association's board minutes that specifies the current officers to get the process started. It might take a letter from a former signer. Then the bank should provide new signature card documents. Some banks will require the signers to come into the branch personally to sign. Some may require you to all come in at once! Some banks are more flexible than others.

You may want to consider if you need all the accounts that you have in light of the increased FDIC requirements. Remember that the Civil Code requires operating and reserve funds be kept separate to maintain the integrity of reserve funds (California CC 1365.5(c)). One association recently found that the penalty to close a CD was only $35 and that reduced the number of banks they have to deal with. Be sure to check on any early withdrawal penalties before closing out any account. If you have several CDs, set up a schedule showing the bank, account number, interest rate and maturity date and monitor the date so you can be proactive when a CD matures.

For associations that have CDs, always mark your calendar with the CD maturation date and during the week or so that they allow you to renew the CD or cash out, go into the bank and ask what is their best rate rather than simply letting the CD roll over into another year at the interest rate of the bank's choosing. Quite often when CDs roll over into a new year, the interest rates are lower than that which you would get if you go into the bank and insist on the highest yield possible before you roll over the CD. After all, the banks want you to keep your money in their bank.

Look into online access for your accounts. Only board members can withdraw or transfer funds from reserve accounts (CC 1365.5(b)). Will the bank allow limited online access to view balances only? If the association has a checking or money market account and a CD at the same bank, ask if the CD can be shown on the same monthly statement as the other accounts.

For those of us who prepare the tax returns for the association or for larger associations, review or audit the financial statements, it is an absolute must to have year-end bank statements or balance confirmations. Auditors will use a bank confirmation form signed by an account signer where the balance information is sent directly to the auditor by the bank. Sometimes the bank provides the balance the day they receive the request and not the year-end and the process has to be repeated in order to get the balance as of the year-end. As a reviewer, I will accept other bank documentation that shows the balance at year-end that ties to the interest earnings and the association's general ledger. Some CDs pay monthly, some quarterly or only at maturity so it is critical to obtain reliable account balance information from the bank.

For me, the 2012 year-end was the worst in obtaining all the balance information necessary to review financial statements and prepare tax returns. Do your accountant a big favor, please! If you have CDs or accounts which do not send monthly statements, mark your calendars for the week immediately after your year-end (e.g. January 6, 2014 for calendar year-ends) and contact each bank to obtain a year-end statement and put it with your year-end records. It saves time and money for all of us.

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