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South Coast Homeowners Association

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IN THIS ISSUE

UPCOMING SOUTH COAST MEETING WITH ATTORNEY BETH GRIMM – OCTOBER 13

Take a nap beforehand and bring your thinking cap to the SCHOA program on October 13. Attorney Beth Grimm, the most prolific author in California about HOA problems has added a new topic to her two hour presentation and will be hitting 3 very timely and important subjects hard and fast in the two hour program. As usual she will bring a well-rounded Plain English perspective as to what is currently happening in the 3 most confusing and misunderstood arenas in the HOA world, offering both a legal and practical perspective, and some proactive solutions.

[ADDED] PALM SPRINGS VILLAS II BID FOR SUPREME COURT REVIEW. This CASE is added because of an existing court decision that is the subject of a request for review by the highest court in California. Granted or not, this case will establish some important law in the state. It will speak to the question of whether an individual board member can be held responsible for any losses that an association suffers because of bad decisions. The Board President on the hot seat is an 87 year old woman who signed construction contracts allegedly without investigation of contractor licenses and without board approval, and signed loan documents without a vote of the members and may be put to the task of "proving" diligence. The HOA was sued by a contractor for breach of contract. The Association has sued the individual board member seeking judgment. At stake in California is the future of the protections afforded by the Business Judgment Rule, Directors and Officers Liability insurance options, and the pros and cons of board service. **It's way too hot to not talk about!!**

REPAIR AND MAINTENANCE PROBLEMS? Are you dealing with any maintenance, repair and replacement questions or disputes in your HOA or Condo Association? Are you confused by AB 968 and the law (before, now and after January 1, 2017) relating to responsibility for exclusive use common area maintenance and repair? Are you concerned or confused about who fixes windows, doors, balconies (flooring, railings, joists, privacy walls, enclosures, etc.), stoops, planters, painting, siding, roof covering vs. the structural parts of the roofs, roof decks, washers, dryers, leaks from roofs, washers and dryers?

RENTAL LIMITATIONS? What about short term rentals and limiting rentals? What are the pros and the pitfalls? And which controls, the law or your documents? Can you ban Air BnB rentals altogether or cash in on fees that are similar to the local "taxes" and fines being imposed by municipalities throughout the state?

Come to this session and Beth Grimm will try to give you some simple strategies for dealing with and heading off the problems in these areas. She will do her best to keep you awake (this is an evening program for a change) offering strategies to avoid horror stories in these areas. You may need help just deciding whether policy-making can alleviate the problem, or you need an overhaul of your governing documents (meaning amendments or updates).

Beth says she is looking forward to coming to Goleta, as usual, to share a few hours with you brainstorming solutions to HOA and Condo quandaries

Date – Thursday, October 13, 2016
Time – 7:00 – 9:00 PM (refreshments at 6:45)
Place – Encina Royale Clubhouse – 250 Moreton Bay Lane – Goleta (Fairview exit North)

HOA REQUIREMENTS ON SALE OF HOME

By: Roy Helsing

Editor's Note: Mr. Helsing is the founder of the Helsing Group, a consulting firm specializing in all aspects of California Common Interest Developments for the past 25 years and was the speaker at our June 2016 meeting. Additional information can be found at www.helsing.com

One of the more confusing areas of HOA responsibility concerns the duties of the homeowners' association when someone is selling their home. In itself, as you will see soon, it is not confusing at all. However, it gets confusing in practice because neither the realtors, lenders, nor most recently the legislature seem to understand it. Therefore, their representations to both the buyer and the seller (and quite frankly to the association) add confusion to what would otherwise be a smooth affair.

Simply put, the association has only two responsibilities involving the sale of a home. Both of those are to the seller - not to the buyer or the escrow.

Responsibility to the escrow – the seller has a responsibility to provide a demand to the buyer. A demand is simply a statement showing the amount of the assessment for that unit, the amount of any past due assessments or other fees that (if not cleared up) the buyer could be responsible to pay, and any outstanding violations against the separate interest being sold that might also become the responsibility of the buyer after sale. (The association will dupically provide this demand for the seller, and will normally require the seller to authorize release of this information, as it does disclose personal financial matters, if the seller wants the association to provide this demand directly to the escrow.)

Responsibility to the seller – portions of the Civil Code require the seller to give to the association a variety of documents and disclosures. Those include minutes (if requested), budgets, CC&R's, by-laws, fine policies, delinquency policies, disclosures on reserve funding and other documents that may be needed depending on the situation. Note – this duty is a duty of the seller to give the buyer. It is NOT the responsibility of the association to give those

to the buyer or to the escrow. The seller already has all these documents (except perhaps the minutes if they are requested), but should they have lost them and they ask for replacement documents, the association has the duty to provide those to the seller.

What could be simpler! It gets confusing for a variety of reasons because the agents often start to use their own forms or outside parties that combine these two requirements into one document (which means it can't be used), or start adding other items and bits of information that the association may not have authorized to be released to third parties. Most of these issues evaporate and everything goes back to simple again if the buyer's requests are sent to the seller. The association can answer, to the seller, most any reasonable question but it would be unreasonable to provide those to the buyer. Incidentally, it could also prove very expensive if the buyer decides to walk away because they don't like the answer to one of the questions that falls outside the disclosures and documents required by the civil code.

Fees – The association can only charge their direct costs for providing the demand and documents. That means if the association is self-managed, they can only charge for their actual reproduction costs and mailing costs. If they are managed, they can charge whatever fee they have negotiated with the management company in providing these services to the association. One thing to be careful of – often realtors will tell the seller they need to have the association provide the documents the seller is supposed to provide. That is simply wrong and there is no reason for the seller to pay for these documents when they already have them. If you are selling your home, feel free to avoid those costs and push back by saying that you will provide them. If you need a few of them, most associations have them available on line so you can get them for free. No reason to pay the manager to provide what you already have or have available. The fee for these documents must be disclosed both at the time of request and the time of delivery.

Please note that I did not mention any duties toward realtors, lenders, appraisers, or any other entities. There is a simple reason for that, which sellers should appreciate – as indicated above, discussions with outside parties can cause a loss of sale and that is not a position the association should be in.

Please also note that if you live in a condominium, I did not discuss a "Condo cert" or a "Lender's Cert" or any similar documents. That is because the association not only has no duty to complete those certifications, but it actually picks up liabilities when it does so. The California Appellate Court has upheld that position. However, lenders put out enough pressure and misinformation concerning these forms that dealing with them will be the subject of a different article.

In summary, the association has two duties and two duties only. Provide a demand to the escrow and documents to the seller if the seller requests them. That is it. Providing information verbally or in writing to other than those two parties mentioned only increases risk to both the association and to the seller.

HOA CERTIFICATES – SWIMMING IN SHARK INFESTED WATERS

By::Roy Helsing

In the previous article we discussed that an association owes nothing to an escrow on the sale of a home. All sales disclosures are the responsibility of the owner. The demand statement and the disclosure documents the association must annually give all homeowners if the seller needs them replaced may need to but provided to the seller - but the association owes nothing else to either the seller or the buyer. We also discussed the dangers of dialoging with buyers, agents, appraisers, loan officers and others (the buyer could walk away from the sale based on something said, and that could leave the association open for a loss of sale claim). Basically, a real estate transaction is a private transaction between buyer and seller – and does not and should not involve the association.

Then we have an item called a “lender’s certificate” (sometimes called a “condo certificate” or an “HOA certificate” or a variety of any other names). When you hear one of these forms is needed, either as a seller, a homeowner refinancing, or a Board Member, it will help if you go put on the sound track from “Jaws” because a very dangerous game begins at this point. First, I am going to tell you if you are a Board member you need to make sure you have discussed with your attorney how you or your managing agent are going to fill these out, or if indeed you are going to fill them out at all. Boards need to understand what is going on with these documents, and understand the questions you should not (or in some cases cannot) answer – because the lender or their broker is going to tell you “These are just simple little forms that associations fill out daily; they are no big deal.” That is probably one of the big lies, right up there with ”the check is in the mail”.

First of all, not all associations fill them out (and homes do get sold and owners get refinances), and not all lenders ask for them. (Oh, and the FHA does NOT ask for them, although the lender will tell you they do.) Interestingly enough, the majority of the lenders that do ask for them are the same lenders we read about in the press every day in trouble for questionable lending practices.

Secondly, the California Appellate Courts have ruled that associations do not need to provide information beyond what is required by the Civil Code. Such information is routinely requested by the certificates, and just answering those questions can cause a problem. Just recently we learned of an association in northern California that ended up having to BUY a home in the community, because they filled out one of these forms and the prospective buyer did not like (or could not get financing because of) an answer to a question not required by the Civil Code. The seller sued the association, asking “Who gave you the authority to fill out this form?” (Hint: discuss with your attorney indemnifications or other mechanisms to make sure the owner even wants you to fill this out, and the wisdom of even talking to the buyer’s lender rather than requiring them to send their request through the seller.)

OK, so what makes these forms dangerous and worthy of obtaining legal advice if you are on the Board of Directors (and for homeowners reading, why your association cannot treat these lightly in spite of what your lender is telling you)? There are several reasons. The first one is that they require the association to become a party to what should be a private transaction between buyer and seller. They do this in spite of the fact that the law says otherwise, and in spite of the fact that they know they are putting a liability on the rest of the homeowners in the community. While every seller and homeowner refinancing wants the association to help them, they generally do not understand they are not becoming part of all other sales and

refinances in the community. But it is even worse; they not only want the association to become part of the sales transaction, they want the association to "CERTIFY" - with some real heavy language - disclosures that, if required at all, should be the responsibility of the seller.

The second reason these forms have enough pitfalls to warrant legal advice is that many of the questions themselves are problematic, for a variety of reasons. While every lender has their own form, I will use some real examples from actual certificates below.

a. They are unclear. (There is a difference between the question "Can the association annex additional property" – almost always a yes; and "Can the developer annex additional property?" – Maybe yes, maybe no – takes some research.)

b. They ask for information an association would not normally maintain or have access to. ("How many homes are primary residences?" "How many are secondary residences?" "Are there any adverse environmental factors affecting the project or individual units?" "How many units are under contract for sale?")

c. They ask for an interpretation of law. Unless you are licensed to practice law in California, some questions you simply can't answer, even if you think you know the answer. Potential examples follow, but in each case you should check with your attorney. ("Does local zoning limit the activities permitted on the property?" "The HOA does not have or waives its 'right of first refusal' to the sale, lease, or transfer of a unit in case of a foreclosure or deed in lieu?")

d. They are worded in a way that you cannot answer with a yes or no, but the lender demands a yes or no answer and will not take an explanation. (My favorite here is one that asks "is this a legally constituted condominium, with the ownership owned as tenants in common?" By definition in California that would not be a legal condominium. Easy to answer if you just strike the last half of the sentence and assuming your attorney tells you that is not interpreting law – but then the lender refuses to take it with the strike out. A no will kill the sale, and a yes is a falsehood.)

Hopefully, you can now see why the theme song from Jaws should be playing; lots of potential issues that the lender wants the association to "Certify". None of the tricky questions are questions asked of FHA or Freddie Mac or Fannie Mae. Lenders have every right to say "We won't loan without this form" but associations have a duty to protect the entire membership and should not decide how to fill these out, or whether to fill them out at all, without getting a legal opinion. Homeowners need to understand that when the lender comes back saying "Your association is refusing to answer these questions," the issue is with the question – and even with the lender demanding the form itself – and not the association trying to stay honest and protect the remainder of the homeowners.

US MAIL DELIVERY UPDATE

In an update to delivery times for first class mail (January 2016 newsletter), I have noticed in the last couple months that next day deliveries have been restored in the Santa Barbara area. I wouldn't want to stake my reputation on mail arriving the next day but I have been watching postmarks on my incoming first class mail and many times, local delivery is occurring in one day. For about 18 months prior to that, all local mail took two days to deliver. How long next day delivery might last is anyone's guess.

FRAUD HAPPENS – A TRUE STORY – THE NEXT CHAPTER

By: Michael J. Gartzke, CPA

Note: This is a follow-up article to the November 2015 article by Catherine Kuhn, CPA that appeared in our newsletter about a Ventura County property manager accused of embezzling $900,000 from an HOA in Simi Valley. At that time, the accused was awaiting trial in Ventura County Superior Court. Here's what happened next.

In December 2015, Kristin Davis, owner of Paradigm Management in Thousand Oaks, went to trial after being arrested in 2013 accused of embezzling funds from the Big Sky Homeowners Association in Simi Valley. A subsequent investigation also discovered a $600,000 loss from the Oak Park Calabasas HOA. As reported by the Ventura County Star and the Simi Valley Acorn, the jury trial lasted two months. At the conclusion of the trial, the jury convicted Ms. Davis of multiple counts of felony grand theft, felony tax evasion, felony forgery, felony insurance fraud and failure to file state income taxes. She was sentenced to 12 years in state prison and ordered to pay restitution of up to $3 million to the associations. Left unsaid is what happened to those embezzled funds from the time the fraud started in 2008 until her arrest five years later.

In October 2009, a former management company employee tipped off the Big Sky association and Paradigm was immediately fired. In addition, Paradigm's chief financial officer (CFO) was also arrested at the same time as Ms. Davis. Ms. Davis blamed her CFO for the thefts although the thefts started nearly a year before the CFO was hired. The CFO testified during the trial that she was told to sign the checks and didn't believe anything unethical was happening because the management company owner had the board's consent. The district attorney argued that the owner set up the CFO to take the fall. The CFO did plead guilty to grand theft in March 2015 and was sentenced to six months in county jail and five years of felony probation. I presume the CFO must have received some of the benefit of the embezzled funds.

See Ms. Kuhn's article in the November 2015 newsletter for a detailed discussion about fraud and steps boards can take to deter and reduce the risks.

SOUTH COAST HOA WEBSITE RESOURCES

Our website, www.southcoasthoa.org, contains resources to help you operate your association including:

- A 15-year archive of our newsletters

- A directory of our professional and vendor sponsors
- Outlines and seminar materials distributed at past South Coast HOA meetings
- Links to other HOA organizations' websites, legislation and instructional videos

BUDGET AND FINANCIAL CONSIDERATIONS FOR 2017

Disclosure Documents – When updating your disclosure documents that you mail with your budget for 2017, please note that the Davis-Stirling Act of the California Civil Code which governs association operations was completely restated as of January 1, 2014. The Civil Code references from Sections 1350-1378 no longer apply. You will need to update your code references to the new Code sections. The new code is available online and the *2016 Condominium Bluebook.* Sample disclosures are at the Resources tab on the South Coast website – Look for the 2014 Legislative Forum (Smith)

Drought Considerations – We have had 6 years of below-average rainfall. Lake Cachuma is at 8% capacity. Watering restrictions have been passed by water districts and substantially higher rates and penalties are being imposed. Should we have another year of low rainfall, there will be significant negative impacts on water usage/landscape costs, etc.

Water/Sewer Rates - There are many water districts in Santa Barbara County (and I'm sure other counties, too). The City of Santa Barbara has been increasing rates 3-4% per year for the last several years in July. This year, Santa Barbara raised its rates 21%. The Goleta Water District imposed a 16% rate increase in mid-2012 and has scheduled 5% increases for the next 4 years. Solvang passed a huge base rate increase in late 2011. Goleta and Santa Barbara imposed large drought surcharges in July 2015. Montecito Water imposed severe penalties for usage exceeding the allowance it calculated for customers. Review your recent billings for rate changes or go online for rate information to estimate future costs. When water users reduce their consumption, the water districts income is reduced. As a result, more increases are in store for the districts to continue to meet their costs.

Southern California Edison (and PG&E) – Is imposing "time-of-use" rates in 2015-16. If you need electricity during peak periods, your rates will increase. If your primary electric use is higher at night (outside lighting), your rates may decline.

Trash/Refuse – Trash Rates typically increase in South Santa Barbara County 3-4% per year in July. Therefore, your current rates should be good for the first 6 months of 2017.

Most other association expenses appear to be stable. The CPI-U for the Los Angeles region increased 1.2% from July 2015 to July 2016. (The Bureau of Labor Statistics buys a different mix of things than I do. I'm sure my inflation rate is greater than 1.2%!) Issues with uncollectible assessments from foreclosures have decreased from their peak 2-3 years ago.

Budgets and the Civil Code disclosures are due to members no later than 30 days before the start of the association's fiscal year. For calendar year associations, that means December 1.

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