SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

SELECTED NEW LAWS FOR 2001

In addition to the "Pet Bill" (AB 860 – see October 2000 newsletter) that was signed into law this year, there were several other pieces of California legislation that were signed by the Governor and became effective January 1, 2001. These new laws as well as some new case law will be covered in detail at our January 30 (Goleta) and February 26 (Santa Maria) meetings. See the back page for locations and times and join us for our annual update with attorneys well versed in this industry.

AB 1493 – Change in anti-discrimination cover sheet disclosure Civil Code 1352.5 – In 2000, a new California law went into effect requiring associations and others who distributed association governing documents (CC&Rs, bylaws rules, regulations and articles of incorporation) to place a cover sheet in 20-point red type on the documents advising that any provision in the documents that discriminates may be void and advised the public as to how the offending provision could be stricken from the document. Obtaining the statement in red ink was burdensome for associations and the provision that the County Recorder could change your documents was also troublesome.

This new law removes the red ink requirement (can now be black), reduces the type size to 14 point, and changes the language of the disclosure to read as follows:

> If this document contains any restriction based on race, color, religion, sex, familial status, marital status, disability, national origin or ancestry, that restriction violates state and federal housing laws and is void, and may be removed pursuant to Section 12956.1 of the Government Code. Lawful restrictions under state and federal law on the age of occupants in senior housing and housing for older persons shall not be construed as restrictions based on familial status.

AB 1493 now establishes two separate procedures for amending documents to delete discriminatory provisions depending upon who is requesting the amendment.

Member of the Association (owner) – If a member of the association asks the board of directors to remove discriminatory language from the CC&Rs, bylaws or rules, and the board agrees with the request, then the board can amend the governing documents to delete the discriminatory language and re-record them without a vote of the members. Be sure to involve the association's attorney in this process to be sure that the amendment is done correctly.

Nonmember of the Association – Nonmembers of the association can also ask to have discriminatory provisions of your documents removed by petitioning the California Department of Employment and Fair Housing (DEFH) to request removal. DEFH has 90 days to respond to the request. In the event you are subject to this outside request for amending your documents, get your association's attorney involved immediately. While some discriminatory provisions are easily identified, reasonable people can disagree as to whether provisions such as occupancy restrictions are discriminatory. Without able representation, an association could be steamrollered by such a request. I would think that the likelihood of an outside request would be remote but who knows?

AB 1823 – Disciplinary Action against a member – Procedures – Section 1363(h) of the Civil Code has been added to define the procedure necessary to impose a monetary penalty or fine against a member of the association for a violation of the governing documents. For a penalty or fine to be effective, the board of directors must:

> Provide 15 days or more notice by personal delivery or first class mail to the member of the date, time and place of the board meeting at which the board is planning to consider the disciplinary action against the member. The notice also must provide the member with a statement describing the nature of the alleged violation, that the member may attend that meeting and that the member may address the board at that meeting. Members are entitled to have the matter addressed in executive session (Civil Code 1363.05(b)).
>
> If the board decides to impose a fine or other penalty against the member after the hearing, it must notify the member within 10 days after the hearing as to the action taken. If the board does not meet these notice requirements (before and after the hearing), then the fine or penalty may not be imposed and is invalid.

Section 1368 of the Civil Code has been modified to require that the association provide any of the unresolved notices to a prospective buyer in a sales transaction. While monetary penalties can probably be collected through escrow, this provision is more useful when dealing with nonmonetary issues such as unauthorized architectural changes not previously resolved. A prospective new owner could not claim that he did not know about the problem. You are not required to inspect the seller's unit prior to providing any relevant disclosures. This section is intended to be applied only for those violations that you already know about and that you have provided prior notice to the current owner.

AB 1859 – PROTECTION OF ASSOCIATION ASSESSMENTS – In our May 2000 and June 2000 issues, we wrote about the Le Parc HOA in Simi Valley that had a substantial judgment imposed against it as a result of a lawsuit. When the judgement was not paid in a timely manner, a receiver was appointed by the court and regular assessments that were for paying for gardening, utilities and insurance were applied instead against the balance due on the judgement, leaving the association unable to meet its operating obligations to its members. This bill amends Civil Code 1366 to exempt regular assessments from a judgement creditor only to the extent necessary to perform essential services. Essential services will be defined by the court.

SB 453 – CONVERSION OF COMMUNITY APARTMENT PROJECTS TO CONDOMINIUMS – South Coast member attorney Steve McGuire worked with our state Senator Jack O'Connell to gain passage of this bill that allows community apartment projects (among some of the first homeowner associations) to be more easily converted to condominiums in order for them to obtain bank financing on purchases, etc. This law will be more fully discussed at our January 30 meeting.

SB 2011 – SENIOR HOUSING – This bill was passed while a more comprehensive bill, SB 1382 was vetoed by the governor because of a $250 fee imposed to certify an association's status as a senior housing complex. The Unruh Civil Rights Act dealing with housing discrimination (Civil Code Section 51) has been completely revised. If your association is considered to be a senior's housing complex, review the law in your *2001 Condominium Bluebook* starting on page 203. More information is available from the South Coast office if you are affected.

POTENTIAL LEGISLATION

Manager Licensing – A bill to license HOA managers was pulled during the 2000 legislative session when it appeared that the costs to be borne by the managers would be prohibitive. A new model is in the works that is more of a registry with bonding and continuing education requirements. No bill has yet to be introduced. All 2001 bills must be introduced in some form by the end of February.

Records Inspection – A bill that would have allowed members to review all association records including privileged attorney-client correspondence and executive session minutes did not pass in 2000. We expect some sort of records inspection bill to be introduced in 2001.

INDEPENDENT CONTRACTOR REPORTING TIP

In our December 2000 issue, we provided an extensive discussion on the state's new independent contractor registry and how you get to help build it. To help manage your reporting burden, consider reporting as many contractors as practical in January based upon last year's activity. For example, if you use a cleaning service monthly at $100.00, go ahead and report them now, estimate the contract at $1,200 and check the box that the contract is ongoing. Then you won't have to worry about reporting them in July after they have received $600. Many service providers such as handymen, gardeners and accountants can be reported in this manner.

UTILITY RATE UPDATE – ASSESSMENT OPTIONS

The December rate notice from Southern California Gas Company shows the baseline rate per therm to be 90 cents. As we have reported in recent issues, this rate has been steadily increasing since mid-2000. It is now 67% above the rates in effect in January 2000. For those associations that provide gas service to members, you are experiencing some sticker shock based upon the current rates.

In our October 2000 issue, we wrote that electric rates were frozen until March 2002. It now appears that an early thaw is in the works. You have seen the same articles and editorials that I have in the newspapers and on TV. Edison and PG&E are losing billions as a result of a deregulated electric market. You can bet that increased costs will be passed through. But how? I have read that 30% increases are possible. I believe it could be a lot more than that based upon San Diego's recent experience. For some associations with modest common area electric bills (outside lighting), you will probably be able to absorb the increase. For other associations, this will be a substantial increase. Operating budgets tend to be lean with little built in for contingencies. Further, associations with fiscal years such as June 30 did their budgeting last spring before any of these increases were evident as thus may be already exceeding their natural gas budget significantly.

How can you deal with the increases? The utilities have been touting conservation. Most associations have installed low-energy lighting, shut off their pool heat in the winter and did the easy things years ago. Fortunately, these cost increases are now getting substantial publicity in the media so it shouldn't be a surprise to the members. Here are some options that you may consider to pay for increased utility costs.

5% Special Assessment: Civil Code Section 1366(b) allows the board of directors to impose a special assessment up to 5% of the budgeted gross expenses of the association. For an association with a $200 per month assessment ($2,400 per year), an assessment of up to $120 per member (5% of $2,400) could be imposed. You may want to consider this form of assessment if you are unsure how much the utility costs will actually increase. Careful monitoring of the association's budget on a monthly basis will be necessary. At least 30 days notice must be provided to the members prior to the assessment being due.

Emergency Assessment: In the event that you needed to raise more than 5% of the budgeted gross expenses of the association to cover these increased costs, the board could pass an emergency assessment. Not paying the gas and electric bills would constitute an emergency, in my opinion. In order for an emergency assessment to become effective, the board must pass a resolution containing written findings as to the necessity of the extraordinary expense and why it could not have been foreseen in the budgeting process. The resolution is then distributed with the emergency assessment notice.

Borrowing from Reserves: Civil Code Section 1365.5(c)(2) provides a procedure to borrow funds from reserves to meet operating expenses. The board must make a record in the meeting minutes explaining the reason for the borrowing and how the money will be repaid to the reserve fund. In most cases, the borrowed funds must be repaid within 12 months of the borrowing. A special assessment subject to Section 1366 may be imposed to repay the borrowed funds. Your editor does not recommend this option.

LAW REVISION COMMISSION – DAVIS-STIRLING ACT

In 1999, the California Legislature authorized the California Law Revision Commission to review the Davis-Stirling Act and provide it with recommendations regarding amending or overhauling the Act. The first act of the commission's review was the preparation of a background study by Susan French of the UCLA Law School. A copy of the 12-page report is available at the commission's website www.clrc.ca.gov. Click on the "Public Comment" link to locate the report. Public comment is due on January 15, 2001, which may be too late for you by the time you read this newsletter. Nonetheless, the background study provides some clues as to what the commission may be looking at this year for law changes.

After providing some background as to what a common interest development is and a brief history of the Davis-Stirling Act, the study reviews some of the criticisms of the current California law. First, it is said that the law is too complicated and hard to understand, even for those with legal training (so don't feel bad when you get confused). Section 1366 is cited as an example of poor drafting of a statute. Further, some sections of the Act cover too many subjects. As a result of the 41+ amendments since 1985, some areas such as insurance coverage are covered in detail while other areas remain vague. Other criticisms include lack of enforcement to comply with existing statutes and that protections of individual rights are weak. One recommendation is that the Davis-Stirling Act be replaced with the Uniform Common Interest Ownership Act that some states have adopted, and modify it with some of the additional provisions of Davis-Stirling. Ms. French offers some recommendations regarding duties and responsibilities of the HOA to its members that is written in such generic, nonspecific terms that it will do nothing to clarify the law, in my opinion. In addition, a number of comments were received by Ms. French during her preparation of the background study. Here are some of them:

Some associations refuse to impose assessments sufficient to cover maintenance expenses. Deferred maintenance problems eventually force the levy of a special assessment which may be very large and which may work a particular hardship for older members. (Editor's note – I have lost track of the number of times I have worked with client association boards who resist increasing assessments, not because they don't want to perform the maintenance but due to the political fallout of neighbors who will be quick to criticize the need for increased assessments.)

One owner in a 500+ unit association wants the board to receive multiple sealed bids for contracting work or services over $250 with the bids to be opened and disclosed during the board meeting. Associations have trouble securing bids for work costing thousands of dollars, let alone $250.

Pass a new law overturning the *Lamden* case which protected the board of directors from liability when they have done their homework prior to making a major maintenance decision.

The tenor of this background study seems to suggest that any recommendations that come from the commission will make it more difficult to serve on a board of directors and that associations will have to rely on professional service providers even more than they do now.

RECORDING BOARD MEETINGS – A GOOD IDEA?

Some associations will tape record their board meetings so that the secretary can develop an accurate set of minutes and not overlook relevant information in the preparation of board minutes. Sounds like a good idea, to be thorough, etc. Be aware; here's how recording minutes can get you in trouble.

In May and June of 2000 (also page 3 of this issue), we wrote about an association in Simi Valley that was hit with a $6.6 million judgement as a result of trade libel and breach of contract claims levied against the association by its earthquake repair contractor (*ZM Corporation dba Qwikresponse vs. Simi Valley Le Parc Homeowners Association)*.

The contractor claimed that the board falsely accused it of diverting funds from the project, using unlicensed subcontractors, defective workmanship and using substandard materials. The contractor invoked the arbitration provisions of its contract after the board stopped making contract payments. The contractor contended that the association had diverted earthquake insurance proceeds for non-earthquake expenses and that created a deficit in the amount available to pay for the repairs.

What sank the association? The existence of over 25 audio cassette recording of board meetings along with videotapes of some meetings which revealed the board's motives and were evidence of the damages claimed by the contractor.

The moral of this story is that if you use audio or video tape recordings of meetings, erase them after you have prepared the minutes. There is no requirement to maintain tape recordings of meetings. They are not the official record of the association. The minutes are.

SECRETARY OF STATE CORPORATE STATEMENT OF OFFICERS CHANGE IN FILING REQUIREMENTS

Effective January 2000, the annual statement of officers that you filed annually with the California Secretary of State's office is now filed biennially (every 2 years). The filing fee is now $20 rather than $10. For associations that were incorporated in odd numbered months (January, March, May, July, September and November), your filing will be due in 2001. For associations incorporated in even numbered months, you should have filed in 2000 and will file again in 2002. Failure to file this form is the number one reason why homeowners associations are suspended in California and technically unable to transact business. It has become more difficult to keep track of the filings with the new 2-year requirement. To check your last filing date you can:

1) Look up the copy of the form if you kept one or research your check register for the payment to the Secretary of State ($10 – 1999 or $20 – 2000)

2) Go to www.ss.ca.gov and access your association's records through the Business Center option. Your incorporation date, filing date and agent for service of process should be available to you.

IS SMALL CLAIMS COURT A SOLUTION FOR A NEIGHBORHOOD NUISANCE PROBLEM?

It may be possible – after other avenues have failed

Last summer, a group of neighborhood residents in Roseville, a suburb of Sacramento, successfully sued in Small Claims Court for damages incurred as a result of a neighborhood nuisance created by another resident.

According to the published report, a family of renters moved into a "quiet neighborhood" in 1995 and over the next 4+ years, the family picked fights with other neighbors, dealt drugs, played loud music and played host to unruly young visitors, etc. Area police had indicated that they were limited in what they could do to solve the problem but recommended small claims court as an option.

11 neighbors filed small claims actions against the landlord. The landlord indicated that he was not aware of the problem. The neighbors, however, produced evidence that the landlord was lying, that they had repeatedly written him and called him about his tenants' conduct. Each neighbor filed a claim in small claims court for $5,000 in damages for reduction in market value of the property and the inability to quietly enjoy the use of their property. The judge awarded a total of $47,000 to the 11 neighbors from the landlord after hearing the detailed evidence about his tenants' conduct.

The neighbors were just happy to be rid of the tenants. "We got our neighborhood back. That's what we wanted", said one neighbor. A second neighbor said, "The money was hardly worth it. We were put through hell." What kind of documentation would the court need to see? According to Beth Grimm, an association attorney from the Bay Area and frequent South Coast contributor, proof for your position would include:

- Organized statements of the witnesses
- Logs of activities kept by the witnesses
- Evidence of attempts to resolve the problem by working with the owner (paper trail)
- Notice of opportunity for the owner to be heard at a board meeting
- Warning letter to offending owner prior to filing of small claims case
- Presence at the hearing of plaintiffs and association board members

I contacted the small claims advisor for the Santa Barbara Superior Court. (Tel – 568-2984). She was not aware of any cases that had been brought before their court. I provided the newspaper article and other information to them and there appeared to be no prohibition to bringing this type of case to Small Claims. If you have a nuisance situation that may benefit from small claims intervention, please call me and I will provide you with a copy of the article that describes the procedure used by these neighbors to get results.

UPCOMING MEETINGS

January 30, 2001 – Law and Legislative Update Panel – Goleta
Holiday Inn, 5650 Calle Real
7 – 9 PM

Last year, we had four South Coast member attorneys provide a panel discussion on a wide range of new legislation and law topics. This program was very well received by you and we had repeated requests to do this type of program again. Each panelist will speak on a specific topic for 10-15 minutes and then questions will be offered by the audience via a moderator for comment by the panelists. Mark your calendars now for this very special program

Panelists: Karen Mehl: Attorney at Law – Santa Maria
New California Legislation

Jennifer Tice: Allen and Kimbell – Santa Barbara
Conversion of Older Associations to Condominiums

James Smith: Grokenberger, Smith and Courtney – Santa Barbara
Consequences of failure to enforce existing CC&Rs

David Loewenthal: Schimmel, Hillshafer and Loewenthal – Sherman Oaks
New California case law

February 26, 2001 – Law and Legislative Update – SANTA MARIA

Quail Meadows West Association Clubhouse
866 Whippoorwill
Santa Maria
7 PM

For the convenience of our members in northern Santa Barbara County and San Luis Obispo County, we offer this annual update.

TENTATIVE MEETING SCHEDULE

March 22 – Larry Pothast, PCAM, Union Bank of California
May 19 – ABCs (A Basic Course) for Community Association Leaders (CAI class)
June 23 – Reserve Studies and Budgeting

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