SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

Upcoming Law Panel Meeting

Thursday, February 7 – Our annual law panel meeting will be at 7 PM at the Holiday Inn, 5650 Calle Real in Goleta. At press time the following attorneys will make presentations:

Jim Smith – Grokenberger, Smith and Courtney – Alterations within a unit – How your CC&Rs and state law can help you regulate changes by owners to their units.

Jennifer Tice – Allen & Kimbell – Effective enforcement of the restrictions of your CC&Rs

Karen Mehl – Karen A. Mehl and Associates – New association law effective in 2002 and pending legislation for this year. Karen is an officer with CAI's California Legilative Action Committee

David Loewenthal – Schimmel, Hillshafer and Loewenthal – Mold – New state laws on mold disclosure and dealing with insurance coverage and exclusion issues.

There will also be a moderated question and answer session on association legal topics from the meeting attendees. Bring your questions.

There is no cost to attend and reservations are not necessary. This is an excellent opportunity to meet those who specialized in association law and get the latest information regarding new law and legislation.

2002 Bluebooks Published – In Stock

The 2002 Condominium Bluebooks have now arrived. For those members who renewed your membership by December 31, your books have been mailed. Other members will receive their books upon receipt of the annual dues. We have some extra copies for $15 each, postpaid. Some associations will order extra copies for all board members, etc. This is a most valuable resource and we have made the Bluebook a part of your membership since 1994.

Mold
Wanted! Dead or Alive
Part One

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.

There has been a great deal of alarming publicity recently about mold. Newspaper and magazine articles report of buildings riddled with toxic mold that requires expensive abatement and repair. Case histories are presented of homeowners and tenants complaining of debilitating health problems from infected houses. We hear of the $32 million settlement in Texas and pending national and state legislation regulating a new and unfamiliar industry. Is mold truly an issue of serious concern or is all this simply the latest sensationalist trend? Do you need to be concerned that your Association may have mold? How do you find out? What do you do about it?

In this series of three articles written for the benefit of Association Board members, you will learn about the causes of mold, be given an overview of mold diagnosis, and examine mold's potential effects on buildings and their inhabitants. We will discuss current industry protocols for mold abatement or remediation and explore Board liability issues and approaches to cost control.

Mold spores are present everywhere, in the very air we breathe. Mold that is a cause for concern grows within building cavities as a result of water infiltration. Mold spores need two things to proliferate: water and cellulose. Cellulose is wood and wood products found in all buildings. If a scientist were to develop a food source for mold, he would be hard-pressed to devise a better one than the cardboard-like backing on drywall. This is why water infiltration from roofing, siding, and plumbing sources is so damaging if left unchecked—the unseen wall cavity becomes a mold reservoir or proliferation site. Eventually, with a continued water source, mold growth can spread right through the drywall into the living spaces of homes.

Not all leaks cause mold growth. Much depends upon the length of time the area stays wet. If leaks are repaired within 72 hours and the area is properly dried out, mold growth will generally not occur. However, if mold has formed in the past from previous leaks, it can go dormant with the absence of water. Once mold reservoirs form, they must be physically removed, or remediated, or they may again become viable with another influx of water. A common mistaken approach concerns killing mold, either by heat or biocide treatment such as Clorox. Mold spores may be toxic to humans whether viable or not (dead or alive). To be properly remediated, spores must be removed altogether, a difficult task within concealed wall cavities within the home. The challenges of diagnosing the location of mold reservoirs and the science of mold abatement will be discussed in part two of this series.

To prevent mold growth, the single most important action an Association can take is to promptly and regularly diagnose and repair water infiltration problems. Not enough can be said for preventive maintenance. The time to replace a roof is BEFORE it leaks. Certainly, all Associations should have in place policies and procedures that quickly address and repair all leaks and water infiltration problems.

How do you know if you have mold? Associations that have buildings with multiple sources of water infiltration from roofing, siding, stucco, chimney and plumbing leaks are likely candidates for mold. The best way to determine if there is mold is to have a professional evaluate the home incorporating input from the resident. Is there a history of roof or exterior wall leaks or plumbing problems? There is an important difference between housekeeping mold that commonly appears in bathrooms, on sliding glass doors and windows and the mold that Boards of Directors should be concerned about. “Common area “mold grows within wall cavities, is evidenced by staining on drywall, ceilings and near windows with a history of leaking. It is found under sinks where the wood is discolored and foul-smelling and underneath flooring materials that buckle and warp.

Another step is to consider the maintenance records for your Association. Have water infiltration from roof or plumbing leaks and water staining been common complaints from your homeowners? How timely has the maintenance response been? Have leaks been allowed to dry properly and completely before drywall and cosmetic restoration has been performed? As a Board, you may consider circulating a survey to your homeowners to determine just how extensive problems may be. If you have reasonable belief that these problems exist, you must act.

Another clue to the presence of mold is the health of the occupants. Flu-like symptoms such as headache, nausea, bloody nose and sore throat can be indicators of mold exposure. Inhabitants in mold-contaminated buildings are often unaware of the gradual affects of such exposure. Reactions to mold and related health affects can be just as unfamiliar to your physician as to you. Patients may present to their physicians with diffuse or indeterminate symptoms. Asthma-like conditions and respiratory issues can be mistakenly treated as seasonal allergies. The similarities in symptoms experienced by a person with mold exposure and someone with another common ailment speaks to the difficulty of physicians today in the diagnosis and care of patients with mold related illness.

Health concerns and property damage are two serious considerations for Association Boards considering evaluating for mold. It is also important to consider liability and insurance issues.

Associations may be considered liable for negligence if mold conditions are known to exist and are not promptly acted upon. But an Association can hardly be considered negligent when it takes a proactive stance by repairing water intrusion promptly, assessing for mold when it could reasonably exist, and passing resolutions that establish policies with regard to mold evaluation, testing and remediation. Unfortunately, with the cost of mold damage skyrocketing, many commercial insurance carriers are considering exclusions for mold damage; in fact many homeowner policies already exclude mold as a cause of loss. We have seen premiums in Associations with known mold conditions double in cost, and carriers decline coverage altogether. The insurance industry is presently reacting to the current mold crisis and how this will affect future rates and claims is at present unknown.

It is clear that mold damage is costly to repair and carries a high liability burden. It is common sense that Associations that respond quickly to water infiltration and potential mold contamination will be less vulnerable to claims and will be doing their homeowners a service by maintaining high property values.

DON'T BE CAUGHT WITHOUT YOUR ESSENTIAL CONTRACTOR PROVISIONS

By: David A. Loewenthal, Esquire
Schimmel, Hillshafer & Loewenthal, Attorneys at Law
Sherman Oaks, Ventura and Santa Barbara

Editor's Note: David Loewenthal and Barbara Mintz of the firm have been frequent contributors to South Coast through our periodic seminars and newsletter articles. Further information can be obtained from the firm's web site at www.shllaw.com or by calling Barbara at 805-564-2068.

The purpose of this article is to identify those elements, terms and provisions that a Homeowners Association should include in any contract entered into with a general contractor and/or a subcontractor. By the time you have reached the point that you are ready to execute a written contract, it is assumed that you have already gone through the necessary steps to ensure that your contractor is licensed, bonded and competent to perform the work in which you are engaging him and reasonably priced. Once the pre-contract background checks have been completed, it is imperative that the contract contain certain critical terms and conditions so that all parties understand their rights, duties and obligations pursuant to the contract.

Always remember that if you fail to specifically set forth a term in your contract and a dispute arises in the future, such ambiguity may be found in favor of the contractor. Any and all agreements or understandings reached between the Homeowners Associations/Owner and the contractor should be placed in writing. Memories have a tendency to fade and be blurred over time; therefore, oral promises by the contractor to perform certain work that is not specifically written into the contract may provide an escape clause for the contractor in the future.

The following terms, conditions and provisions should generally be included within the contract:

A. **Scope of Work:**

The contract should specifically set forth the job description of what the contractor has agreed to perform. In addition, the contract should identify the specific materials or named brands of materials to be used if applicable. As an example, a contract with a plumber should include the location (e.g. bathroom) that is to be plumbed, as well as specific brand identification for fixtures.

Further, the contract should specifically state those items that are not included within the contract. As an example, a concrete contractor who has not contracted to place a waterproofing membrane between a topping slab and a structural slab should specifically state that the contract excludes a waterproofing membrane.

Also, contracts should state that the contractor will comply with all plans, specifications and building codes. By specifically setting forth within the contract the scope and non-scope of the work of the contractor, discrepancies in the future as to the duties and obligations of the contractor will be greatly minimized.

B. **Time is of the Essence:**

Generally, Homeowners Associations/Owners have a specific time frame during which they expect the work to be commenced and completed. This is especially true when the work that is to be performed is structural in nature, as opposed to merely cosmetic. As an example, a contract to have a new roof installed on a building will generally require completion prior to the commencement of the rainy season. Thus, a specific completion date is necessary. Also, by including a "time is of the essence" clause, the contractor is advised at the commencement of the contract that he will be obligated to provide an ample crew to perform his task timely.

C. **Liquidated Damages:**

The purpose of a liquidated damages clause is to place a penalty upon the contractor for failure to timely complete his work. This provision ties directly into the time is of the essence clause and basically states that if the work of the contractor is not completed by a specified date or within a certain number of days from the date of commencement the contractor will be either obligated to repay monies to the Owner or forfeit a certain amount of money for each day beyond the original completion date of the contract.

D. **Insurance and Performance Bond:**

The contract should include provisions for both insurance and a performance bond. The contractor should be properly insured, including Workers Compensation Insurance and General Liability Insurance. If the project is large enough, it may be advisable to have the contractor have the Homeowners Association/Owner named as an additional insured. By

being named as an additional insured, the Homeowners Association/Owner would have direct contractual rights with respect to the insurance policy in case of damage or injury.

In addition, for approximately two (2%) percent of the contract price, the contractor can also obtain a performance bond which will cover the Homeowners Association/Owner if the contractor does not perform his work completely. Thus, the performance bond is in essence an insurance policy that allows an owner to have the work completed by another contractor if the original contractor fails to perform.

E. **Indemnity:**

Due to the litigious nature of the society in which we live, it is important to have an indemnity provision within the contract. An indemnity provision generally states that the contractor will hold the Homeowner Association/Owner harmless and agree to defend and indemnify the owner as a result of any acts and/or omissions on the part of the contractor that gives rise to damage or injury to the project or individuals. This provision is extremely important in circumstances wherein a Board of Directors retains a general contractor to perform significant renovation to a project which has the potential to damage individual units which could lead the individual homeowners to sue the board or the Homeowners Association for the damage caused by the contractor. By having a properly drafted indemnity provision, the Board of Directors could then tender their defense to the general contractor, who would then be obligated to defend and indemnify the Board against the claim.

F. **Fixed Cost or Time and Material Contract:**

The contract should be specifically identified as either "Fixed Cost Contract", i.e., where all work is to be performed for a specified amount of money or if it is based upon "Time and Material", i.e. the contractor charges a certain amount for all labor, time, material and surcharges. Generally a fixed cost contract is more beneficial to an owner due to the fact that the contract amount is specifically known as opposed to being based upon the speed and efficiency of the contractor.

G. **Payment Schedule:**

The contract should set forth when payments are to be made. A contractor cannot require more than ten (10%) percent of the contract amount up front or one thousand ($1000.00) dollars whichever is less. In addition, the payment schedule should be phased in and should never be ahead of the actual work performed. Don't pay for work that has not yet been performed. Further, the Homeowner Association should always attempt to retain a minimum ten (10%) percent retention until the job is totally completed and accepted by the Owner. To the extent that the Owner can increase the retention it should. The greater the amount of the retention, the better the leverage the Owner will have to have the work performed properly.

H. **Warranties and Statute of Limitations:**

Any warranty provided by the contractor should be specifically set forth and identified. You should also determine whether or not the statute of limitations as to a claim based upon breach of warranty is being limited by the contractual terms to less than three (3) years.

I. **Attorney's Fees:**

The contract should also contain an attorney's fees provision which states that if a dispute arises as a result of the work that is to be performed under this contract, that the prevailing party in any such dispute is entitled to the recovery of reasonable attorney's fees. This provision provides a heavy hammer that can be used to try to force the non-complying party, whether it be the contractor or the owner, to comply with the contract.

J. **Alternative Dispute Resolution:**

Often, parties to a contract will wish to have a provision stating that disputes or claims arising from the contract or the work will be submitted to Alternative Dispute Resolution (A.D.R.) or Arbitration. A.D.R can include, but it is certainly not limited to the American Arbitration Association (AAA) Judicial Arbitration and Mediation Services (JAMS), etc. Generally, the inclusion of an A.D.R. provision will be premised upon the fact that both parties have agreed to waive their rights to the filing of a judicial lawsuit.

By including the above-referenced terms, conditions and provisions, the contract will be clearer and more comprehensive with all parties understanding their rights, duties and obligations.

LEGISLATIVE UPDATE - 2002

A number of bills were introduced at the beginning of the last year in the California Legislature affecting homeowner associations. Bills introduced this year could be passed as late as August 2002. In addition, additional bills can be introduced in January-February 2002. These must be passed by August 2002 or they will be dropped.

AB 1700 – Construction Defect Protocol – In the last week of the 2001 legislative session, information regarding the procedures used to settle construction defect cases was incorporated into this bill number, passed and signed by the governor. It is a major part of the Davis-Stirling Act of the Civil Code. Indeed it takes up 15 of the 58 pages in the Bluebook, a full 25% of the Act.

It is a specific, complex law and is applicable to any construction defect action taken after July 1, 2002. Actions commenced prior to that date are not subject to the new code. The act specifies notice to members, builders, insurance companies, etc. and sets forth deadlines to provide information and hold meetings. Dispute resolution procedures are also mandated. If you are a newer association (less than 10 years old) with defect issues, this new law is important to you.

AB 555 – Community Association Manager Licensing - This bill would establish a program for the registration of managers of common interest developments, the California Common Interest Development Manager Registration Council. The council would charge managers fees to register and would impose misdemeanor penalties for failure to comply with its laws and regulations.

A CID manager is defined as an individual who provides management or financial services to an association for compensation. A licensed accountant providing tax and accounting services (but not management or financial services) would be exempt. Financial services are defined in the proposed law as "the preparation of internal, unaudited financial statements, internal accounting and bookkeeping functions, billing of assessments and related services" (Proposed Business and Professions Code Section 11502(e)). Real estate brokers would be exempt from registration.

Concerns have been raised about the costs of the program to managers, the implementation of the program without an exam, due process for managers in the event of a complaint to the council, etc. The bill will probably be modified in the Senate this year before any further action is taken.

Status: – Passed Assembly 56-17; to Senate – Committee Hearing postponed to at least January 2002

SB 419 – Establishment of a state agency to regulate common interest developments

Would direct the California Research Bureau (CRB) to determine what new or existing agency could regulate CIDs in California, provide education, training and guidelines for association operations and improve procedures for dispute resolution. The CRB has started to look into the feasibility of assigning regulatory responsibility to a state agency.

According to Beth Grimm in her Calfiornia Homeowner Association Legal Digest (November-December 2001 issue), a study was performed by the Bureau and the preliminary findings were presented to the Assembly Housing Committee in December. The findings to date may not justify the creation of a state agency and that complaints may be minimal compared to the vast number of HOAs in the state that are operating.

Status: Two-year bill – no formal action yet taken

SB 266 – Special Meetings/Referendums – Would provide a means for members to vote to overturn any action taken by the association's board of directors upon presentation of a petition signed by an unspecified percentage of the members.

Status: Two-year bill – no action yet taken

AB 284/SB 732 – Mold, Environmental Standards, Remediation, Disclosure – These bills direct the state health department to study the effects of mold on public health and to implement guidelines and regulations based upon the findings. SB 732 seeks to determine exposure limits to mold, standards for the assessment of mold in indoor environments and standards for the identification and remediation of mold. When standards are established, commercial and industrial landlords would be required to disclose the presence of excessive mold to current and potential tenants.

AB 284, by Hannah-Beth Jackson of Santa Barbara, would require a CRB task force to perform a study and publish findings on fungal contamination affecting indoor environments. The task force would examine the health effects of fungi exposure, practices for assessing

fungal contamination, whether commercially available methods of identifying contamination are appropriate and prevention and remediation options. These reports should be available in early 2003.

California is now the first state to regulate toxic mold.

California Law Revision Commission – One year ago, the California Law Revision Commission started its review of the Davis-Stirling Act as mandated by the Legislature. To date, the commission has concentrated its efforts on dispute resolution, architectural control procedures and board rule making authority. The commission is trying to develop guidelines to more specifically identify the types of rules that the board can implement and what rules are more like CC&Rs which require membership approval. The commission is considering allowing association members to overturn rules implemented by a board through a referendum process. There would need to be guidance as to what rules could be overturned. For example, could an association's collection policy be overturned through this process?

The commission meets several times per year to consider HOA issues as well as a wide range of other areas of California law. Eventually, the commission will issue recommendations to the California Legislature regarding changes in the Davis-Stirling Act, from specific sections to a complete overhaul.

PROFESSIONAL HOMEOWNER ASSOCIATION ORGANIZATIONS

There are two California organizations that provide a wealth of information to board members of homeowner associations and the professionals who serve them. These organizations are worthy of your consideration to join. Their magazines and programs are first-rate and provide you with additional access to resources and information that are beyond the means of South Coast HOA.

Community Association Institute (CAI) – Channel Islands Chapter – Annual dues range from $150 to $350. Monthly programs are held in Ventura Co. and periodic meetings in Santa Maria- San Luis Obispo. Bimonthly chapter and national newsletter and web site resources. Membership applications are available from Diana Sellers, CAI, P. O. Box 3575, Ventura, CA 93006 – 805-658-1438. www.cai-channelislands.org.

Executive Council of Homeowners (ECHO) – Is a Northern California based organization of over 1,400 California HOAs. The monthly ECHO Journal publishes many articles of interest to all California associations. Their annual seminar and trade show each June provides an array of educational classes and vendor opportunities. Annual dues are $ 95 - $400, depending upon the size of your association. Information is available from ECHO, 1602 The Alameda, #101, San Jose, CA 95126 – 408-297-3246, info@echo-ca.org.

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