

SOUTH COAST HOMEOWNERS ASSOCIATION

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UPCOMING SOUTH COAST MEETINGS

Thursday, July 21 – Our annual summer law seminar with Beth A. Grimm, Attorney at Law from Pleasant Hill, CA. Topics under consideration for discussion include how to define common area responsibilities (the fine line between owner vs. association responsibility), deferring reserve fund contributions, lease limitations, use of uninsured workers to reduce costs and more. Our popular, moderated “Question and Answer” will follow.

Place – Holiday Inn, 5650 Calle Real, Goleta

Time – 7 PM

“THE DAVIS-STIRLING ACT IN PLAIN ENGLISH”

In mid-May, we distributed an extra special member benefit to all primary members of South Coast, the book *“The Davis-Stirling Act in Plain English”* by Beth A. Grimm. The book includes a modified version of the Davis-Stirling Act with the author’s commentary and explanation following each section. A limited number of extra copies are available at \$35/each. Please make your check payable to South Coast HOA and mail to the address above. When we run out, additional copies are available from the author.

A correction: After mailing the books, a correction was noted. "Please note that on page 34 of the Davis-Stirling Act Book by Beth Grimm that the reference to "not less than 60 days." should be "not less than 30 days - the window for getting the budget out is 60 days instead of the 15 days from prior years. See page 35. And thanks to the eagle eye who caught that. Beth Grimm"

THE “ASSESSMENT AND RESERVE FUNDING DISCLOSURE SUMMARY” – Demystified...

By Chris Andrews – Reserve Specialist – Stone Mountain Corporation
www.stonemountaincorp.com

Now that the “Assessment and Reserve Funding Disclosure Summary” is required for association budget disclosures made after July 1, 2005, there has been considerable discussion among board members and legal professionals throughout California as to what is the best way to fill out the form.

The passage of AB-2718 in September 2004 created the new California Civil Code §1365.2.5 with the intent to provide more transparency than ever before in association financial disclosures. This part of the Assembly Bill was primarily supported by realtor lobbies seeking to ensure that potential homebuyers have full disclosure of the financial status of each homeowners association and a preview of potential future financial burdens – in writing – by the directors of each association.

Prior to this new disclosure requirement, Civil Code § 1365 required several disclosures pertaining to reserves such as the percent-funded estimate (as a measure of reserve fund status), the list of the reserve components that the association must maintain, along with their useful life, remaining life, current & future cost to replace, etc. But the description of the required disclosures was buried in paragraphs of the code and not presented in a standardized format as is now the case with Civil Code §1365.2.5 and its formalized “Assessment and Reserve Funding Disclosure Summary.”

In order to simplify your task of filling out the new “Assessment and Reserve Funding Disclosure Summary,” each of the six line-items to be filled out in the form are described below, followed by a sample of the entire disclosure form at the end of this article:

PARAGRAPH #1:

- (1) **The current assessment per unit is \$ _____ per _____.**
Note: If assessments vary by the size or type of unit, the assessment applicable to this unit may be found on page ____ of the attached report.

Paragraph #1 is straightforward and needs no explanation.

Note that this is the first time that disclosure of an itemized list of variable assessments per unit is required annually. It is surprising how many associations have established incorrect variable fees based on incorrect square-footage assumptions. So this clause of the disclosure may trigger a reshuffling of fees in some associations when members find out that their neighbor living in the same size unit is paying less in assessments per month.

PARAGRAPH #2:

- (2) **Additional assessments that have already been scheduled to be imposed or charged, regardless of the purpose, if they have been approved by the board and/or members:**

Date assessment is due:	Amount per unit per month (If assessments are variable, see note immediately below):	Purpose of the assessment:
	Total:	

Note: If assessments vary by the size or type of unit, the assessment applicable to this unit may be found on page ____ of the attached report.

This paragraph of the disclosure form must have been drafted by someone who hasn't lived in an association because the majority of special assessments in associations are *not* on a monthly basis. They are usually in one or more *installments*. Try specifying a one-time special assessment of \$1,000 per unit in this format and you'll agree.

If your association plans a special assessment that it is not on a monthly basis, make sure you clarify that here. If you eliminate the “*per month*” clause in the second column, the form seems to be more generalized to fit most installment-style special assessments.

Note also that this section applies to *any* special assessment whether it is for a reserve assessment or an operating budget assessment (e.g. to pay for an unexpected insurance increase).

PARAGRAPH #3 & #4 (“The 30-Year Promise”): Of all the sections in the disclosure form, board members are most hesitant to fill out this section because they feel they are being coerced into making a 30-year promise:

3) Based upon the most recent reserve study and other information available to the Board of Directors, will currently projected reserve account balances be sufficient at the end of each year to meet the Association’s obligation for repair and/or replacement of major components during the next 30 years?

Yes ____ No ____

Some board members are inclined to answer “No” and explain in Paragraph #4. But as some legal experts would argue, if you answer “No” and the association is essentially in good financial standing, you may be unfairly compromising some of your members’ ability to sell their homes at fair value by unjustly creating the impression that the association is *not* in good financial standing.

Furthermore, if you answer “No” in Paragraph #3, then Paragraph #4 (see below) requires that you explain what you are going to do about the association’s poor financial condition. And you must do so in a rigid format in which you must be specific about just how you plan raise reserve funding and/or levy special assessments to ensure that there will be sufficient reserve funds to pay for the next 30 years of reserve expenses. What if you indicate here that the board plans to raise reserve funding sufficiently to fund reserve expenses over the next 30 years, but next year’s board has no intentions of following through? There are several problems that can arise if you go down this slippery slope.

One legal specialist in community association law, James H. Smith Esq. (Grokenberger & Smith, Santa Barbara, CA), suggests an elegant solution to this dilemma by drafting a specially-worded “**Supplement To Assessment And Reserve Funding Disclosure Summary.**” This is acceptable because Civil Code §1365.2.5(b)(3) allows modification of the disclosure form:

§1365.2.5(b)(3) - The form may be supplemented or modified to clarify the information delivered, so long as the minimum information set out in subdivision (a) is provided.”

The intent of the following supplement drafted by James H. Smith, Esq. is to add language that allows the Board to feel more comfortable signing the disclosure and, for example, responding with a “Yes” to Paragraph #3 if, in fact, they do believe to the best of their knowledge, that their funding plan should provide sufficient reserves for the next 30 years:

**SUPPLEMENT TO ASSESSMENT AND RESERVE
FUNDING DISCLOSURE SUMMARY
[Civil Code section 1365.2.5(b)(3)]**

Due to factors beyond the control of the Directors, including but not limited to the rate of inflation, the rate at which the major components actually deteriorate, unanticipated damage to the major components, fluctuations in material and labor costs and changes in building codes and regulations, the accuracy of the information set forth in paragraphs 3, 4 and 5 above is not, and cannot be, guaranteed. Depending upon the accuracy of the present and future assumptions used in providing the information in paragraphs 3, 4 and 5, the information and conclusions set forth in said paragraphs may not be correct. Therefore, any person reviewing this Assessment and Reserve Funding Disclosure Summary should not, without conducting their own independent investigation and analysis, rely upon the accuracy of the information set forth in paragraph 3, 4 and 5.

Finally, note that a key assumption in Paragraph #3 is that the Board of Directors has *read and understands* the reserve study, but this is not always the case. Have all of the Directors read the reserve study from cover to cover and understand it? Or has just one director read it and the rest of the board is relying on their diligence? As you can see, there are a lot of variables to consider.

PARAGRAPH #4:

- (4) **If the answer to #3 is no, what additional assessments or other contributions to reserves would be necessary to ensure that sufficient reserve funds will be available each year during the next 30 years?**

Approximate date assessment will be due:	Amount per unit per month:
	Total:

See description for Paragraph #3 & #4 above.

PARAGRAPH #5: Here is where the new disclosure form adds yet another level of detail above and beyond that required in Civil Code § 1365. Now, Boards must indicate which capital assets (reserve components) are listed in the reserve study, but are not included in the association’s existing reserve funding.

In other words, which reserve components are the Board *intentionally not funding*. There is a fill-in form (refer to paragraph #5 below) where the board must explain why they are not funding each of these items. As an example, a board might enter the following: *“The board is not funding wood siding replacement with regular reserve funding and plans to levy a special assessment if and when the wood siding needs replacement, but the remaining life of the siding is not known at this time.”*

However, in describing the rationale for not funding each item here, the board may appear as if it is adopting a de-facto *“special assessment method of funding”* rather than a *“regular reserve assessment method of funding.”* Boards that adopt a method of reserve funding heavily dependent on special assessments against future members could be considered as negligent if roofs, roads and/or paint are already in neglected condition and if the future reserve expenses are known to be substantial and the ability of future association members to raise funds of the required magnitude is in question.

Finally, what if an association decides *not* to adopt the entire reserve funding plan recommended by the reserve study, but instead is planning to ramp up reserve funding over a period of years? How should this near-term lack of reserve funding be conveyed in the Board’s response to paragraph #5?

As an example, suppose the reserve study recommends that the association should fund reserves at \$100,000 per year but the board opts to fund at only \$80,000 per year initially? Is the \$20,000 shortfall in funding attributable to any one reserve component? In a few cases when the board has made a conscious decision to do so, it might be. But more commonly, the \$20,000 shortfall in funding represents a conscious decision not to fund 20% of the aggregate pool of *all* reserve components. One might therefore conclude that the most accurate way to respond to paragraph #5 would be to list all reserve components and state that 20% of each component is *not* being funded in the current year, but then state that the association plans to increase funding gradually over the next few years in order to catch up to proper reserve funding levels.

PARAGRAPH #6:

6) As of the last reserve study or update, the current balance in the reserve fund is \$_____. Based on the method of calculation in paragraph (4) of

subdivision (b) of Section 1365.2.5, the required amount in the reserve fund is \$_____, and if an alternate, but generally accepted, method of calculation is also used, the required amount is \$_____. (See attached explanation)

The disclosure form was designed to be completed by board members and paragraph #6 is the only section of the disclosure form into which you can copy data directly from your reserve study without much deliberation on the part of the board. There are only two items:

- ✓ The “current reserve balance” – meaning the fiscal year-end reserve fund balance used as a starting point in the most recent reserve study or reserve study annual update.
- ✓ The “required amount in the reserve fund” – meaning the 100% funded balance as described above.

Note that the phrase *“the required amount in the reserve fund”* has caused considerable discussion among board members in California.

Evidently, the drafters of the Civil Code didn’t consider the various interpretations of the word, “required” here because there is currently no requirement that associations in the State of California must be 100% funded – or 50% funded, for that matter. Yet some board members who have read this paragraph interpret it to mean that their association is now “required” to be 100% funded.

When the code says *“the required amount in the reserve fund,”* it is referring to the dollar value representing the “depreciation-to-date” on all reserve components. If your association has cash in reserves representing the total depreciation-to-date on all of your reserve components, the association would be 100% funded. Most reserve studies provide this figure and refer to it in a variety of ways such as *“Required Reserves,” “Depreciation Liability,” “Ideal Accumulated Reserves,” “100% Funded Balance,”* etc.

Note that in the supplemental section of the new disclosure summary, there is an attempt to clarify this, but it is not expressed in the main part of the disclosure form that is normally sent to the membership:

1365.2.5(b)(4) For the purpose of the report and summary, the amount of reserves needed to be accumulated for a component at a given time shall be computed as the current cost of replacement or repair multiplied by the number of years the component has been in service divided by the useful life of the component. This shall not be construed to require the board to fund reserves in accordance with this calculation.

Here, instead of using the phrase, *“The required amount in the reserve fund,”* it states *“the amount of reserves needed to be accumulated”* which is a more palatable way of describing it. This description is more consistent with the rest of the Civil Code which does not “require” a certain level of reserve funding.

So the correct way to interpret this paragraph is to assume the drafters of the disclosure implicitly want the board to fill in the amount of cash the association would need to have in

reserves if it were to be 100% funded. You can usually find this number on a summary sheet in most reserve studies.

Distribution of the Disclosure

Now that you are an expert on the "Assessment and Reserve Funding Disclosure Summary" form and you have filled it out, you must distribute it to all association members.

1365.2.5(b)(3) The form set out in subdivision (a) shall accompany each pro forma operating budget or summary thereof that is delivered pursuant to this article.

The following clause in the Civil Code stipulates *when* your operating budget (and hence this disclosure form) must be distributed:

1365(a)(4): Notwithstanding a contrary provision in the governing documents, a copy of the operating budget shall be annually distributed not less than 30 days nor more than 90 days prior to the beginning of the association's fiscal year.

To save you the trouble of counting days on your calendar, if your fiscal year-end is December 31st, the last day you can distribute your budget letter (and this disclosure form) would be December 2nd, which is 30 days prior to January 1st. The earliest you can distribute the letter would be October 3rd, which is the 90th day prior to January 1st.

As you see, the disclosure form is not particularly difficult to fill out. But as with any legal document containing forward-looking financial statements, you need to be very careful to make sure you do not make unrealistic promises. You should honestly portray the correct information based on your Board's diligent review of the reserve study and other information available to the board. If you feel uncertain about the proper wording to use, you might want to get further assistance from a legal professional.

[Following is a copy of the "Assessment and Reserve Funding Disclosure Summary" with the special supplement drafted by James Smith, Esq of Grokenberger & Smith in Santa Barbara, CA.]

ASSESSMENT AND RESERVE FUNDING DISCLOSURE SUMMARY

California Civil Code section 1365.2.5 requires that this Assessment and Reserve Funding Disclosure Summary be distributed to all owners not less than thirty (30) days nor more than ninety (90) days prior to the beginning of the Associations fiscal year. The Summary is to be provided with, and accompany, the Association's Proforma Operating Budget or Summary thereof that is delivered to all owners pursuant to California Civil Code section 1365.

- (1) The current assessment per unit is \$_____ per _____.
Note: If assessments vary by the size or type of unit, the assessment applicable to this unit may be found on page ____ of the attached report.
- (2) Additional assessments that have already been scheduled to be imposed or charged, regardless of the purpose, if they have been approved by the board and/or members:

Date assessment is due:	Amount per unit per month (If assessments are variable, see note immediately below):	Purpose of the assessment:
	Total:	

Note: If assessments vary by the size or type of unit, the assessment applicable to this unit may be found on page ____ of the attached report.

(3) Based upon the most recent reserve study and other information available to the Board of Directors, will currently projected reserve account balances be sufficient at the end of each year to meet the Association’s obligation for repair and/or replacement of major components during the next 30 years?

Yes ____ No ____

(4) If the answer to #3 is no, what additional assessments or other contributions to reserves would be necessary to ensure that sufficient reserve funds will be available each year during the next 30 years?

Approximate date assessment will be due:	Amount per unit per month:
	Total:

(5) The following major components, which are included in the reserve study, are NOT included in the existing reserve funding:

Major Components:	Useful remaining life in years:	Reason this major component was not included:

(6) As of the last reserve study or update, the current balance in the reserve fund is \$_____. Based on the method of calculation in paragraph (4) of subdivision (b) of Section 1365.2.5, the required amount in the reserve fund is \$_____, and if an

alternate, but generally accepted, method of calculation is also used, the required amount is \$_____. (See attached explanation)

NOTE: The financial representations set forth in this summary are based on the best estimates of the preparer at that time. The estimates are subject to change.

**SUPPLEMENT TO ASSESSMENT AND RESERVE
FUNDING DISCLOSURE SUMMARY**
[Civil Code section 1365.2.5(b)(3)]

Due to factors beyond the control of the Directors, including but not limited to the rate of inflation, the rate at which the major components actually deteriorate, unanticipated damage to the major components, fluctuations in material and labor costs and changes in building codes and regulations, the accuracy of the information set forth in paragraphs 3, 4 and 5 above is not, and cannot be, guaranteed. Depending upon the accuracy of the present and future assumptions used in providing the information in paragraphs 3, 4 and 5, the information and conclusions set forth in said paragraphs may not be correct. Therefore, any person reviewing this Assessment and Reserve Funding Disclosure Summary should not, without conducting their own independent investigation and analysis, rely upon the accuracy of the information set forth in paragraph 3, 4 and 5.

Please note, for purposes of this Assessment and Reserve Funding Disclosure, the words and phrases stated below are given the following meaning:

1. "Estimated remaining useful life" means the time reasonably calculated to remain before a major component will require replacement.

2. "Major component" has the meaning used in section 1365.5. Components with an estimated remaining useful life of more than thirty (30) years may be included in a study as a capital asset or disregarded from the reserve calculation, so long as the decision is revealed in the reserve study report and reported in the Assessment and Reserve Funding Disclosure Summary.

Dated: _____

By: _____

"Caution"

This form is provided as a courtesy by James H. Smith, Esq. of the law firm of Grokenberger & Smith. Telephone: (805) 965-7746. Your Association's Governing Documents and/or changes in the law may require this form to be modified.

IS ALL YOUR MAIL ARRIVING ON TIME?

The Postal Service continues to automate much of the mail handling process involving less and less "human" handling. While this may work 99+ percent of the time, the letters that aren't handled correctly generate some bizarre results. I don't know if it's just me but I have recently seen an increase in errant mail. Be alert to the following. The check may indeed be in the mail, but who knows where! An owner may have mailed the payment but if you use a lockbox service or don't retain the envelope with the postmark on it, your treasurer may assess a late payment penalty when it's not your member's fault.

1) The Postal Service places bar codes and zip code information in black on the front of the envelope and in fluorescent orange on the back. If an error is made in entering the bar code or if two pieces get stuck together, a letter can be routed nowhere near where it was

supposed to go. If the misdirected mail is simply placed back in the mail without blacking out the errant bar codes, it simply keeps coming back. Recently, a client mailed a payment to me in one of my self-addressed stamped envelopes. It was routed to Washington, DC and then returned. Time from Goleta to DC – 2 days. Time from DC to Goleta – 15 days. No word why the return trip took so long.

- 2) Owner paid monthly assessment using a hand-written address on the envelope. One of the digits of the PO Box could have been misinterpreted. Mailed from San Francisco, it took over 6 weeks to make it to the PO Box.
- 3) A tax return was mailed to a client in Goleta and the last 2 digits of the street address were reversed which placed the package across the street from where it belonged. Took two weeks for it to be returned to sender to be re-mailed to the correct address.

MEGAN'S LAW AND YOUR ASSOCIATION

A recent change in California law has put the entire California Sex Offender Registry on a website that anyone can access to determine whether a registered sex offender lives in your association. Prior to this year, you had to go to the Sheriff's Department and look up the information on its computer. The new web site is www.meganslaw.ca.gov. Once there, you need to review the rules of use and agree to them prior to accessing the data. I would recommend that someone from each association check the Registry and if a registered sex offender lives in your association, contact your attorney to determine what the association can do (disclose identity, contact law enforcement, have members go to the web site or do nothing). Do not proceed without an attorney's advice. There are penalties for making disclosures improperly or harassing a registrant.

The easiest way to access the database is to enter the zip code of your association. I tried 93111 for example and 6 names/addresses were listed. I tried 93013 and 14 names were listed. This information may not be up-to-date as the registrant may have moved recently or is not keeping law enforcement informed or his/her address.

WHO CAN ATTEND OPEN BOARD MEETINGS?

Some months ago, an ad appeared in the *Santa Barbara News-Press* from a "loan consultant" suggesting that potential buyers of a common interest development unit attend a few homeowner association meetings before deciding to buy in a particular community. "There, the elected representatives discuss and decide on issues affecting all of the development's residents in which all residents may attend and take part in."

In keeping with the "Open Meeting Act", which is part of the Davis Stirling Act (Civil Code 1363.05), please be reminded of the following. These are business meetings of the board. Owners may participate in the member commentary period wherever it is placed in the agenda. Nonowners are not required to be allowed attendance at the meeting unless the board authorizes their attendance. Perhaps the better advice would be for a prospective owner to speak with existing owners concerning the operation and management of the association to gain a sense of whether they wish to buy into the association. These meetings are not open to the general public or the press.

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Santa Barbara, CA 93108
805-969-5838

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Goleta, CA 93117
805-964-9988

Allstate Insurance
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Lompoc, CA 93436
805-736-8944

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David/Jim Smith
1880 N. Ventura Ave.
Ventura, CA 93001
805-653-1220

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Derrick's Roofing
Frank Derrick
650 Ward Drive, Suite F
Santa Barbara, CA 93111
805-681-9954

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Community Associations Institute –
Channel Islands Chapter
P. O. Box 3575
Ventura, CA 93006
805-658-1438
www.cai-channelislands.org

September 17 -2005 Annual Homeowners
Expo – Marriott River Ridge, Oxnard

Executive Council of Homeowners
ECHO
1602 The Alameda #101
San Jose, CA 95126
408-297-3246
www.echo-ca.org

June 18, 2005 – Annual Seminar, Santa
Clara Convention Center

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