SOUTH COAST HOMEOWNERS ASSOCIATION

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THE SALE OF A UNIT – "THE DISCLOSURE MAZE"

What is the association required to do?
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The California Civil Code requires numerous disclosures when a member sells his unit to a new buyer. Obviously, larger associations deal with sales more frequently than small associations. In an average year, perhaps 10-15% of your units will change hands and a number of them will be refinanced, depending upon the changes in interest rates and the current level of appreciation of your association's units. Over the past three years, we have seen many more sales than in previous years. We have also seen substantial appreciation in members' units, especially in south Santa Barbara County. As a result, these disclosures have become an integral part in today's real estate transactions.

PLAYERS INVOLVED: Here is a list of the various players that may be involved in the disclosure process.

- Owner of the separate interest (unit) – Seller
- Seller's real estate agent and/or other professional consultant
- Prospective purchaser – Buyer
- Buyer's agent
- Escrow Officer
- Lender (Underwriter, loan processor, loan agent, loan broker)
- Appraiser
- Insurance Agent
- Association (Board, manager, accountant, attorney)

WHAT ARE YOU REQUIRED TO DO?: California Civil Code Section 1368 governs the disclosures that are to be provided to prospective purchasers. Under 1368(a), the **seller** shall, as soon as practicable before the transfer of title to the separate interest (unit), provide the following to the prospective purchaser (**buyer):**

- Copies of Governing Documents (CC&Rs, Bylaws, Articles of Incorporation and Rules and Regulations). Each of these documents must have the red nondiscriminatory language disclosure placed on the face of each document (SB 1148 disclosure – effective 1/1/00)

- If the association has an age restriction, then a statement must be made that the restriction is enforceable only to the extent allowed by Civil Code Section 51.3.

- Copies of financial documents as required by Civil Code Section 1365. Nearly all these documents are required to be distributed annually between 45-60 prior to the start of the association's fiscal year. The accountant's review or audit is due 120 days after the end of the fiscal year:

  - Operating budget for the current fiscal year

  - Summary of reserve study disclosures

  - Statement provided by the board of directors as to whether the board anticipates that a special assessment will be required in the future to meet its obligations under the governing documents

  - Procedures used by the board to establish its reserve disclosures and funding

  - Reviewed or audited financial statement prepared by the association's CPA if the association's revenues exceed $ 75,000 annually

  - The association's policies and practices in enforcing lien rights or other legal remedies for default in payments of its assessments

  - A summary of the association's property, general liability, earthquake and/or flood insurance policies

- The **seller** is to obtain a statement from an authorized representative of the **association** as to the rate of the current monthly assessment and fees and any special assessments currently due or assessments levied against the seller's unit. The association is to provide a statement as to what assessments, late changes, interest and collection costs are unpaid on the date the statement is prepared.

- If the association is evaluating construction defect issues and has provided a notice of preliminary list of defects under Civil Code Section 1375 to its members, then a copy must be provided from the seller to the buyer.

- If the association has entered into a settlement agreement or other resolution of construction defects, then the seller shall provide the buyer with the settlement agreement disclosures mandated by Section 1375.1 of the Civil Code

- Any change in the association's current regular and special assessments and fees which have been approved by the board of directors, but have not yet become due and payable as of the date of disclosure.

With the exception of the disclosure regarding unpaid assessments or fees, the law imposes the obligation for these disclosures on the **seller**. How is the seller to know what his disclosure obligations are? While most associations provide these disclosures to their members on an annual basis, many members do not maintain these records in a manner that would facilitate direct disclosure to a prospective buyer. In some cases, a member may be unsure that the information that he has is the most current or accurate available. The law recognizes this fact of life and provides **upon written request,** (not over the phone) that an association shall **within 10 days** (not now, not tomorrow, not the end of the week) of the receipt of the request, provide the **owner** (not the buyer, not the lender, not the escrow officer) with a copy of all the documents and disclosures. The association may charge a fee for this service, which shall not exceed the association's reasonable cost to prepare and reproduce the requested items. The association cannot charge a fee to transfer title except for the actual costs to change its records. If anyone or any entity fails to comply with the provisions of Civil Code Section 1368 outlined above, it can be subject to a civil penalty of up to $500.

You might consider adding a statement to the various documents that you distribute to your members to "Retain for future reference" or "Required document for transfer in a sale". In other words, some language that would convince an owner to hold on to the document for future use. You could indicate that the costs associated with the transfer will be lower and that by providing the information to the buyer directly, the seller can reduce his costs.

In reality, you seldom receive a written request from the seller or his agent. Usually, the first request comes from the lender. Usually, the lender is in a hurry and can't wait 10 days for a reply because they have waited too long to get in touch with you. The lender says that they can get the documents from escrow. But, escrow hasn't asked for them. They just need this small, 4-page questionnaire completed. Some of the questions that appear on such a questionnaire are:

- Are 70% of the units sold to individuals as their primary year-round residences or second homes? (Do you know how all your members use their property?)

- How many units are principal residences; how many are second-homes; how many are investor/rental units? (Do children of owners living in units qualify as owner occupied? How often do you calculate an occupancy ratio? It can change at any time)

- At the start of the current fiscal year, how many owners are more than thirty days delinquent in their assessments? Total amount of outstanding assessments?

- Is the amount in the reserve account adequate for the replacement of major components? (My favorite, a highly speculative, judgmental question. Is there ever enough money in the reserve fund?)

- What are the terms of the manager's contract? What is the penalty for early termination?

- Does the project conform to existing zoning regulations?

- Must 67% or more of owners vote for any change in the CC&Rs

The lender would like this information faxed to them as soon as possible. While some of this information does not change, much of the information, especially the financial and occupancy information changes constantly. While rare, we have seen lenders question information provided in the questionnaire. One underwriter called me on a questionnaire that I had completed questioning the owner occupancy percentage. Some lenders will not lend unless the association has a minimum of 60-70% owner occupancy. I had relied on the board President to provide the information and she gave me a complete schedule, by unit, as to whether they were owner-occupied, second homes or rentals. The underwriter accused me of lying by inflating the occupancy percentage. It turns out that she had used the assessor's records that are updated annually. The association had several recent sales and nearly all had converted from rentals to owner-occupied. She didn't believe me and as a result, that financial institution did not make the loan. On the other hand, we have heard of loan processors/agents asking that the owner-occupancy be raised so that they can obtain the loan. The ethics in both of these situations are unacceptable.

Then you hear from the escrow officer. They usually have a standard form requesting the documents required under Section 1368 plus the last 12 months' minutes from the association's board meetings. This is a disclosure that the California Association of Realtors recommends to its members. When copying these minutes, be sure to exclude your executive session minutes, as some associations will file them with their regular minutes (not a good idea, keep them separate). Sometimes, escrow will contact you early and then re-contact to confirm assessment payments at the end. Other times, the documents will be overlooked until only a few days remain and then you get the panic call. I have yet to understand how a real estate transaction can progress that far without any association disclosures. So your 10-day window for providing disclosures has evaporated once again.

Then the seller's agent calls. He sent you the pest control report last week. Why hasn't the work been done? Pest control requirements are set forth under Civil Code Section 1364. A commitment by the association that it will meet its obligations is generally sufficient.

Managers may be responsible for 10 or more associations and each association's information is different. Frankly, it takes a while to complete these questionnaires and pull all the required documents. Each of these transfers requires numerous phone conversations and documents completed. The association or its manager must be compensated for the time spent assembling the document packages, preparing the disclosures, completing the questionnaires and responding to phone calls and other requests for information and action. It is recommended that the association or manager obtain a signed agreement that its cost will be paid by a responsible party. Not every escrow is closed or every refinance completed. Yet, you will incur the same costs on every request. Some associations will charge a flat fee for these services. $100-$125 is a commonly charged amount. After drafting this article and reviewing the amount of work involved and the documents needed, I wonder if this is enough. Others will charge based upon the exact services requested and provide a price list to the responsible party that they can order the documents and services they need and pay accordingly. Some will add an additional charge for rush processing.

Then after compiling all the required information, what percentage of the prospective buyers actually read any of it? One manager related a story about a new owner calling on his cell phone as he was travelling with his dog from his old home to his new one that he just closed escrow on. Unfortunately, his new association prohibited dogs and it was clearly stated in the CC&Rs as well as the rules and regulations booklet. He had signed off as having received the documents but no one had **told** him that he couldn't have a dog.

Some associations have adopted a policy of not providing information over the telephone but only responding in writing to a written request. The law does not require you to respond to verbal requests. In some situations, liability might arise for the board or its manager if verbal responses were misunderstood or misinterpreted.

So while the law provides for 10 days notice to provide disclosures to the seller, seldom does the seller make the request and seldom will 10 days meet the needs of the requestor. Be aware of the various disclosures and documents required and educate your members about the need to contact the association early, if they plan to sell or refinance their property.

PLEASE FEEL FREE TO MAKE COPIES FOR YOUR BOARD MEMBERS
SHARE THIS NEWSLETTER WITH YOUR ENTIRE BOARD OF DIRECTORS

COMMON RENTER QUESTIONS

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Editor's Note: Beth was our speaker at our July 20th meeting. Part of her presentation was dealing with tenants and remedies available to associations. The following questions and answers were distributed by Beth at the meeting and are reproduced here with her permission. Thanks again, Beth, for meeting with us last month.

I have received many questions relating to problems with renters. Problems are not uncommon in developments with a high percentage of rentals. Some of the problems come from the renters, some come from the landlords, and some come from the association. Some renters are just unwilling to live by any rules or keep the property in good shape. Some landlords fail to "educate" the renters by telling them there are some rules. Some associations treat renters like lepers.

Many associations have good results by interacting with the renters directly. If the renter acts involve serious threats to residents, management or the Board, it makes sense to avoid personal contact and deal only with the owner. However, if the renter is friendly, then personal contact and giving the renter the opportunity to cure the violation before contacting the owner is more likely to start things off on the right foot. How do you tell when the renter is friendly? If you have a telephone number, a phone call is a good clue. If you get the brush off then that's a pretty good indication that more assertive communications will be necessary.

You can strengthen the association's enforcement policies by pursuing violations vigorously and consistently, by noting violations, giving the owners and the renters notice, giving the renters the opportunity to cure, and then holding a hearing and setting up the fining process. In order to fine any homeowner, in a CID (per Civil Code Section 1363), the Board needs to have circulated a policy relating to fines to all of the owners.

The following are some other common questions I am asked about renter situations.

Question: May an association evict a renter?

Answer: An association does not have the right to evict renters; that is up to the Landlord (owner of the property), unless the CC&Rs authorize the association to evict. Even then, it is risky for the association to take over the responsibility to evict a troubling renter. The legal liability is increased when the association steps into the landlord's shoes. And if the association assumes any responsibility at all, the owner is likely to step aside and wait for the association to do the work. I do not believe this is healthy for the association.

Question: May the association suspend rights for the renter to use the clubhouse or other facilities for violations or late or non-payment of assessments?

Answer: So long as the CC&Rs or Bylaws allow it, the association can suspend the rights of an owner or renter to use the common area for nonpayment of assessments or any other violation of the governing documents. To do so notice must be given at least 15 days before the Board is going to hear the matter (more notice is required if the documents require more notice). Some documents limit the suspension period to 30 days, but some specify that the suspension period may be for the period of the violation. If the party violating the rules or CC&Rs is interested in using the common area facilities, this remedy might help.

Question: May the association fine a tenant, and how are fines imposed for repeated infractions of the rules without holding more than one hearing?

Answer: As stated above, an association must have a fining policy that has been circulated to the owners to fine any owner. The association may fine owners, but there is no authority to fine renters. The association has no legal relationship with the renter (the rights to suspend use of the common area facilities flow through the owner). An association should schedule at least one hearing for a violation of the rules or governing documents. If the conduct is conducive to continuing or recurring violations, the association could note in the meeting notice that the hearing will be held to determine if discipline should be imposed, and that the discipline being considered is a fine for each similar or same violation, or a daily, monthly, or weekly fine is being considered where the activity constitutes a continuing violation. That way, fines for continuing or recurring violations could be imposed after a hearing without holding an additional hearing each time the same activity occurs. Important tips: it's best if the association's policy includes language addressing continuing or recurring violations for same, similar or repeat violations. All notices to the owner should do the same. The written decision should also note the specific point that fines of the same nature will be automatically imposed without future hearing, if that is the decision of the Board.

Question: If a renter refuses to maintain the property, may the association intervene, enter the property, and clean up the property and bill the owner?

Answer: The owner is responsible to maintain the property. If it is not maintained to reasonable standards, chances are the CC&Rs allow the association some remedy. Most CC&Rs allow right of entry and most that I have seen allow a reimbursement assessment. Most association documents require giving the owner reasonable notice and an opportunity to cure the problem before taking action. If there is no such language in the documents, at least 15 days notice of hearing is indicated by Corporations Code Section 7341 as adequate notice for suspension of membership and that is a good guide. Practically, speaking, "self-help" remedies (such as cleaning up or maintaining property that is the responsibility of the owners) should only be arranged sparingly, if there is a way to do it without having a confrontation with the owner or renter. If you are picking up trash or garbage to be taken away, then there is less of a chance of confrontation. If the association is arranging to have landscaping or yard maintenance done which will take more time, there is more chance of a confrontation, and these factors should be taken into consideration when the Board is trying to determine what remedy is best.

Any situation involving violations of the rules or standards by renters must also involve the owners, that is, unless the association communicates with the renters and they voluntarily resolve the problem. One way that associations can involve renters is to have a renter liaison to report to and work with and/or report to the board. But having input makes renters feel a part of the community and represented. If you include renters in your newcomer welcomes, allow them to come to meetings, and include them in social events, you will find that most will be good members of the community.

UPCOMING MEETINGS

August 30 – Reserves, Budgets, Accounting and other Things Financial with Michael J. Gartzke, CPA, 7 PM Holiday Inn, 5650 Calle Real, Goleta. Topics to be covered include understanding the law with respect to budgets and reserves; how to read a financial statement (your manager's and your CPA's!) and more

September 16 – Community Association Institute, Channel Islands Chapter Trade Faire – Clarion Hotel – Ventura Beach, 2055 E. Harbor Blvd., Ventura (Seaward exit). See insert from CAI Channel Islands for the list of seminars and free events

September 30 – Community Association Institute, Mid-California Chapter Trade Show – San Luis Obispo

PUBLICATIONS AVAILABLE FROM SOUTH COAST HOA

2000 *Condominium Bluebook* – A compilation of laws and other useful information to assist in association administration. $14.00 postpaid

Operating Cost Manual for Homeowners Associations – a useful guide when developing your association budget, published by the California Department of Real Estate - $ 6.00 postpaid.

Extra Copies of the South Coast Newsletter – Can be added to an existing membership for only $10 per year. This would allow an extra copy to be sent to another address within the association. Copies of the Bluebook or other publications distributed by South Coast are not included in this subscription.

IMPLEMENTING A SPECIAL ASSESSMENT

At one time or another, it is not uncommon for an association to have to consider imposing a special assessment on its members. Many times, a special assessment is a result of inadequate reserve funds, a major expense that occurs sooner than expected or is substantially more expensive than budgeted or an operating expense that increases beyond that anticipated in the budget. The imposition of a special assessment is usually covered in the association's governing documents and is also laid out in California Civil Code section 1366.

MEMBER VOTE REQUIRED

Normally, a vote of the members is required to approve a special assessment. There are exceptions, to be discussed later. In order to impose a special assessment, a majority of the owners (more than 50%) of a quorum (also more than 50%) permitted to vote under the California Corporations Code. For example, in a 100-unit association, if 65 members voted (over 50%), then it would take 33 yes votes (more than 50% of the 65 voting) to impose the assessment. Your association's attorney should be consulted to ensure that the vote is handled properly. Proxies may be used for voting.

Just like regular assessments, at least 30 days notice must be given to impose the assessment, once the assessment is approved by the members. Also like regular assessments, the special assessment is delinquent 15 days after its due date. Late fees, interest and collection costs can be added to delinquent special assessments. Again like regular assessments, a lien can be filed if the special assessment remains unpaid, subject to Civil Code Section 1367.

EXCEPTIONS TO MEMBER VOTE

As noted earlier, the board can impose a special assessment without a vote of the members in two situations. First, the board may impose a special assessment of up to 5% (or multiple special assessments that total up to 5%) of the budgeted gross expenses of the association for that fiscal year. This law, Civil Code section 1366(b), restricts a special assessment the board can impose without a vote of the members to a fairly low amount. For example, a board of a 40-unit association with budgeted gross expenses of $100,000 could impose special assessments under this section totaling up to $5,000 during the fiscal year. Divided by 40 units, the maximum assessment per unit would be $125. These types of assessments are used most commonly to make up a shortfall in the operating account that may have occurred due to a utility rate increase, change in insurance coverage or unanticipated minor maintenance. If your association assessments are variable or partially variable (different members pay different assessments based upon square footage of unit, number of bedrooms or some other criteria), then be sure to consult with your governing documents to determine how the special assessment is to be assessed to the members. It may not be the same as how regular assessments are assessed.

A second exception provides that the board can impose a special assessment without a vote in certain "emergency situations". There is no dollar limit on the amount that can be assessed under this section. If you are planning to use the emergency situation exception to impose an assessment, be sure to get your attorney's opinion. Different people (and attorneys!) will have different opinions about what constitutes an emergency. As provided in Civil Code Section 1366(b), an emergency situation is any one of the following:

1) An extraordinary expense required by an order of the court. (e.g. Le Parc, previous)

2) An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible where a threat to personal safety is discovered.

3) An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the pro forma operating budget under Section 1365. However, prior to the imposition or collection of an assessment under this subdivision, the board shall pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.

For example, if the association needs to re-roof and has not set aside any reserve funds, it would be hard-pressed to use exception 3 to impose an assessment without a member vote. The board should know what its reserve obligations are through its reserve study. However, exception 3 might be available to a board that finds that it is required to replace a "40-year" roof in 15 years as a result of "El Nino" and improper installation of the original roof. An example of exception 2 might be the repaving of your parking lot after an inspection by your insurance agent who indicates that your coverage might be cancelled due to the unsafe conditions found during the inspection.

IMPLEMENTING THE SPECIAL ASSESSMENT

When soliciting a vote on special assessments, some members will simply "vote their checkbook". If they have to write a (large) check, they will simply vote "no". For larger assessments, offering to accept installment payments or a discount for a lump-sum payment may facilitate approval by some members who may not have the means (or desire) to make a large payment up front. Making a payment option available will necessitate more work for your treasurer or property manager to track the payments but it could spell the difference between passage and failure.

A number of years ago, a client association needed to make a special assessment. An option was provided to pay the entire assessment of $412 or allow members to make 12 payments of $36 per month ($432). Approval was received by membership vote and exactly 50% of the members paid the entire amount up front and 50% of the members elected to pay in monthly installments. Collections were accelerated when a member paying in installments,

sold his unit. Your property manager, CPA or attorney should be able to assist you in setting up an installment payment program.

OTHER FUNDING OPTIONS

Civil Code Section 1366 also allows an association board to increase its regular assessment by 20% without a members' vote as part of the budget process. Depending upon what the association needs the funds for and how soon funds are required, the association can build a line item into its pro forma operating budget to generate additional funding. While beyond the scope of this article, an association may be able to obtain a loan to meet a major maintenance obligation that can be repaid from increased operating assessments over several years. An article appeared in our October 1998 newsletter on Borrowing for Major Repairs, which described the process of obtaining a loan to meet major Association obligations.

AFRICANIZED BEE NOTICE

By: Barbara Perrier, Vice President
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Ventura County is now declared to be a "Colonized African Bee County" by the County Agriculture Department. We recently had two calls for bee eradication that turned out to be Africanized Bees. One swarm was 85% Africanized; the other was 59%. Bees tend to swarm and become active in early spring. Our concern is that these swarms are break off groups from large Africanized bee colonies somewhere within the Port Hueneme and Ventura areas.

BACKGROUND – There was an experimental African Bee project in South America and some queens were released accidentally. The reason for the experiment was that the beekeepers were looking for a bee that would be comfortable in the heat, produce more honey and be less susceptible to mites and other diseases. The African bee fits the bill. It produces more honey than the European Bee, the larva hatch faster, is smaller and therefore the overall hive space would be utilized less for the bees themselves making more room for the honey. Because of its aggressive behavior, there is not much that can be done to stop the African bee from taking over the European colonies as it moves north and it will eventually become the dominant strain of bees.

It is almost impossible for the average person to distinguish the African bee from the European bee. The fact that it is slightly smaller is not that big a deal when comparing the two bees. We could be looking at a colony of European bees that simply did not have an adequate supply of pollen and therefore, did not grow as large. Whenever we treat bees that we suspect to be Africanized, we submit a large number of them to the County Agriculture Department for positive identification.

The African bees will usually nest in lower areas than the European bee. For instance, bees nesting in a ground level water meter is not normal for European bees and will most likely be Africanized bees. The Africanized bees have much more aggressive behavior. So, if you get

a call that bees are being very aggressive and low to the ground, they will most likely be Africanized HoneyBees.

In compliance with Senate Bill 250, “All persons controlling bees (Africanized or European) for hire must hold the proper Structural Pest Control License and be registered as Certified. The hive must be removed unless the owner signs a specific waiver. An exception exists for persons engaged in the live capture of bees without pesticides. Insurance requirements must be met. They may not use smoke or even soapy water to control the bees. Also under this new law, the pest control operator is required to open the wall and remove the hive and honey from the wall voids. This is not to be a simple pick it up and dispose of it removal. Rather, it requires opening and scraping the walls and wood studs, possibly doing wood removal, which may be very expensive. So if you have bees on the interior of buildings, you will either have to have the hive removed or sign a carefully written waiver and be aware that the honey may melt and stain walls, rodents and various insect pests may be attracted to the honey and honeycomb. Also, bees will be attracted to the honey, leading to a likelihood of reinfestation. In addition, the honey would be contaminated either by pesticides or insecticidal soap. Failure to remove a hive could leave the association vulnerable in the event of injury.

We recommend caution to anyone using leaf blowers or other loud machinery, especially if you notice a number of bees around. If you have a call regarding bees, we recommend you caution people/children to stay clear of the area. Even dead bees can sting, when stepped upon or mishandled.

Not every pest control company is certified to treat African bees. Costs to eradicate are based upon the size and location of the hives and the number of bees involved.