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PARK WATCH

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DOWDALL LAW OFFICES, A. P. C., Attorneys at Law

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE, CALIFORNIA 92866 (714) 532.2222, FAX 532.3238, 532.5381
NORTHERN CALIFORNIA: 980 NINTH STREET, 16TH FLOOR, SACRAMENTO, CALIFORNIA 95814, (916) 444.0777, FAX 444.2983

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GOVERNOR BROWN, PART DEUX

EMPIRICAL TRACKING OF BROWN'S LEGISLATIVE HISTORY: A NEW CAUSE FOR ALARM

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GOVERNOR BROWN
HISTORY LESSONS

By: Terry R. Dowdall, Esq.

● SYNOPSIS:

Hello, 2011, Hello, Governor Brown. Again.

Those who forget the lessons of history are doomed to repeat them. California's 34th Governor was Edmund G. "Jerry" Brown, Jr., from 1975 to 1983. Well, he's back. For park owners, planning now for the future must include the plain likelihood that Brown's attitudes toward landlords will be little if any different than during his first administration. Some other fairly obvious and odious assumptions also apply. It is a new day in Sacramento, but somehow it feels like a re-cycled 1970's. The benevolence of the outgoing administration is gone. And liberal cool is back: translation: it may be a dark time for property rights and mobilehome park operators.

* * *

MRL AND THE BROWN EFFECT:

The empirical study of Brown's impact is not heartening. His first administration, self-confessedly *"without a plan"* (a confession of which we were all reminded by Whitman's camp) was decidedly hostile toward property rights generally and the Mobilehome Residency Law in particular. For example of the general, Brown labeled Proposition 13, the cornerstone of homeownership, a "fraud." *But what of the specific considerations of the Mobilehome Residency Law?*

If one considers the actual set-backs and damage inflicted on the industry during the time of the first Brown administration, it compares *negatively* with those even of his democratic successors. Moreover, the harm has been long lasting and cumulative. A study we conducted of all legislation pertaining to the Mobilehome Residency Law reflects a constant diminution of property rights. But the worst events in recent history are reflected during Brown's time in office. Adverse changes have not been reversed or neutralized during later administrations not openly hostile to property rights. Rather, times of relative calm reflect few gains in property rights, and mostly a relative maintenance of a legislative *status quo* punctuated with the occasional veto.

In the graph which follows on the next page, one can visually see the progressive decline in property rights by comparing anti-property rights and pro-property rights measures, weighted for importance and significance.

BROWN KILLED THE 17 YEAR RULE

Perhaps the most damaging legislation during this period in history is the demise of the seventeen-year rule. Originally, the seventeen year rule (former *Civil Code* §798.73), provided that on sale, a mobilehome older than seventeen years may be required to be removed from the park; a measure sometimes, not always, required by the park owner for the health and safety of other residents, the upgrading of the park and the improvement of values and attractiveness of the community. Brown signed the law prohibiting demand for removal (unless the home was extremely

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dilapidated) which spelled out a *de facto* death knell for community improvement.

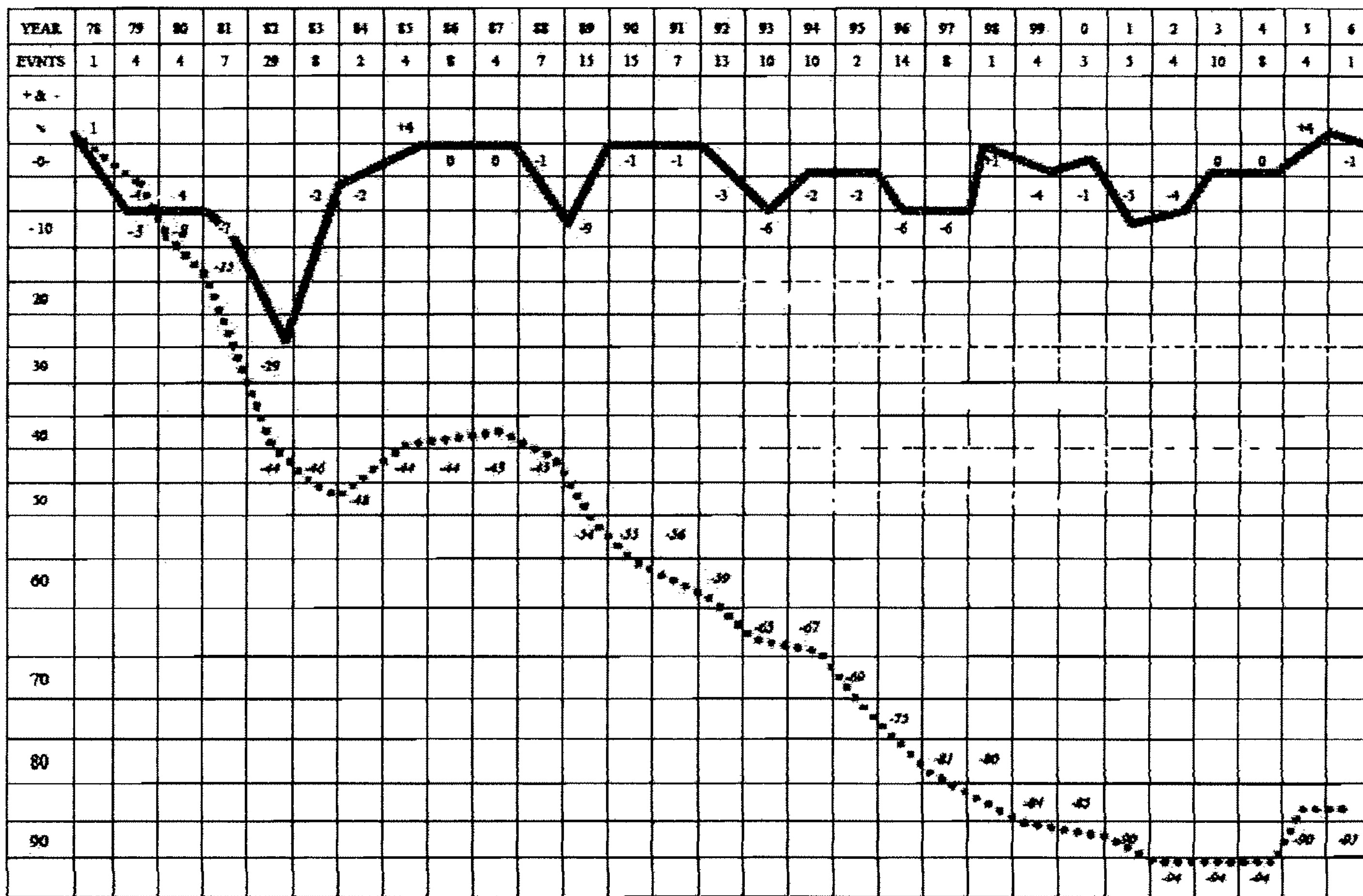
Brown insured that management lost the power to rid parks of the blight of the older, ill-kept and often dangerous mobilehome. The result? Ubiquitous, hazardous, old, fire-traps not worth court battles to eject. Every day, newspapers nationwide report fires in old, run down and unsafe mobilehomes.

And California, still, mandates such continuing exposure of unsuspecting residents buying obsolete, ill-constructed, dangerous housing product, as a means only to placate profit-seeking sellers.

On the whole, Brown's record (and the record of his successor's in legislation in the mobilehome field) looks like this:

WEIGHTED MRL LEGISLATION BY YEAR (1978 TO PRESENT).

(1978 - 1983) Brown ——— (1983-1991) Deukmejian ——— (1991-1999) 36th Governor, Pete Wilson ——— (1999 - 2003) Davis ——— (2003--) Arnold



The top line across the page reflects activity of each administration; the dotted line below reflects the cumulative downward spiral of property rights. The graph is current through 2008; based on developments thereafter, it might further be noted that based on vetoes of pernicious efforts to gut property rights now contained in State subdivision laws, the administration of Arnold Schwarzenegger was very favorable to the mobilehome park industry.

In contrast, the Brown administration represents the greatest of legislative set-backs and losses to the mobilehome park industry.

VETO BACKSTOP GONE

What more can we expect from "Brown Part Deux"? First, we can reasonably anticipate that Governor Brown will not similarly veto destructive legislation which comes to his desk. For example, Governor Schwarzenegger has vetoed subdivision legislation, which would allow residents to hold subdivision processing and approval hostage to resident committees dictating lot prices. Resident approval of subdivisions would have the practical effect of coercing the park owner to cede control over lot prices and terms or abandon resident ownership efforts. Would Governor Brown sign such legislation? Recent resident efforts include the establishment of a state-controlled investigatory agency empowered to hear and mediate mobilehome disputes. Will Governor Brown sign such legislation? What about efforts for mandatory education of management personnel? Or forced exclusion of management personnel from parts of the mobilehome common areas when tenants choose to collectively meet?

Based on the empirical evidence of past exercise of governmental powers, there is no indication that Governor Brown would resist any of the unsuccessful legislative efforts of the past, or the destructive manifestations of resident whim in the future.

CARTE BLANCHE POWER TO TAKE PROPERTY RIGHTS?

If renewed efforts appear for passage of resident veto powers over subdivisions, and such efforts are passed into law (and not struck down as unconstitutional), a dangerous precedent and concomitant momentum may emerge for establishment of veto powers depriving owners of *other* rights and privileges. Some cities have already crossed the line by prohibiting amendments to the park rules and regulations unless approved by a majority of residents. Some continue with impunity to violate property rights by allowing capital improvement pass-throughs only when approved by residents. Failed efforts of the past even include attempts to prohibit capital improvement expense pass-throughs altogether, a constitutionally mandated right. *Could these past failures morph into resident victories now?*

THE WANING ROLE OF THE GSMOL

These considerations can be counterbalanced in part by the waning influence of the Golden State Mobilehome Owners League. Changes have resulted due to diminishing membership resulting after HR1158 (requiring protection of "familial status") and diminishing numbers of senior citizens. GSMOL membership is significantly less than in previous years. It is believed that family residents do not join GSMOL for several reasons, perhaps because there is no discontent with management and appreciation for moderate-cost housing availability provided by mobilehome parks. Still, the GSMOL is a group which some legislators appear to take seriously. In contrast, the ability to succeed with positive and pro-active legislation advancing property rights is affected by the plain reality of a dominant democratic party sway.

Protecting property rights is the mantra of the WMA, the MHET, the Pacific Legal Foundation and so many other fine organizations. However, gauged upon our past experiences, current composition of the legislature, and Governor Brown guarding the "hen house" of property rights, a new and destructive crusade against property rights may properly be considered as more imminent than at any time since he last governed some thirty years ago.

VESTING PROPERTY RIGHTS

The legislature seems to respect vested contract rights. Authors of new legislative change account for and exclude vested contracts, leases and rental agreements from the operation of new, more restrictive legislation. Indeed, there are still leases in effect today which call for automatic unilateral extensions of the term long since outlawed. In areas where rent control is in effect, such leases are invaluable to the park owner, and continue to be assigned on sale for the full extension of their extended terms. Long term leases have withstood legal challenges from municipalities seeking to truncate the vested terms of such agreements. This office prevailed in a hard-fought court battle and appeal to annul a city ordinance which cut off the right to enforce leases. In short, once a long term lease is in effect, the park owner is legally entitled to enjoy the full term and all the benefits, rights and entitlements of the lease. *Legislative change during the term of the lease cannot diminish or interfere with the rights contained in the lease agreement.*

THE BEST ADVICE SOME FATUOUSLY IGNORE

If a mobilehome park owner intends to operate without closure or cessation of use, the long term lease should be used for new tenancies, and where agreeable, with existing incumbent residents. Period. The long term lease is a veritable shield against negative legislation diminishing the rights and duties of owners and management. It is the sole manner in which property rights can be protected at the local level.

How long? As long as possible. Many leases are now being drawn for up to the period calling for property reassessment (thirty years). Such leases, carefully drawn, allow for all economic concerns of the owner, including market change, adjustments for economic and other changed circumstances, all reasonable expenses, fair return, re-indexing, resale increases, and all conceivable issues of concern during tenancy; even unilateral truncation of the term if desired. *In essence, leases allow for full managerial discretion which would be exercised in a free market without rent controls.*

> If a mobilehome park owner intends to operate without closure or cessation of use, the long term lease should be used for new tenancies, and where agreeable, with existing incumbent residents. Period.

Given the plain reality that a tenant has a non-terminable tenancy and has the right to hold over in tenancy indefinitely, for his or her life and that of the heirs, the only other alternative is to provide a short term or month to month agreement the legislature may change at will.

A self-imposed naked exposure to legislative change is the only product of short term agreements. In a hostile political environment, the property owner is either trusting the dominant democratic legislature to "do the right thing" by park owners (despite harrowing past experiences), or inviting a deprivation of property rights by not invoking lease protections whenever possible.

WHAT IF THE LEGISLATURE RESCINDS LONG TERM LEASES?

Without leases in place for as long as possible, management will forever lose the right to enjoy bilateral agreements for long term security, foreseeability and protection against the winds of political change affecting park business. The right to offer long term leases, exempt from local rent control, is a very valuable right which is enjoyed and sometimes taken for granted. It should not be so. Long term leases are very valuable both for financial protection and as defensive protection from adverse caprice of a hostile legislature, now to be influenced by a very hostile resident lobby effort.

Plainly, it is time to evaluate the benefits of leasing and establish a leasing program and update for your park. It is the simplest, least expensive and near ironclad way to protect your individual property rights.

* * *

FAILURE TO MAINTAIN ACTIONS-

● *Tenants Score on Claims of Water Pressure, Sewer Spills, Electrical Wiring*

Capistrano Terrace is a pleasant community in a pleasant area of South Orange County. Just beneath the superficial beauty of this ostensible bucolic paradise lies a pernicious cancer unique to Orange County: rent control. Residents are used to getting their way in this City, and voting power of the mobilehome resident bloc ensures the City's foot stays firmly planted on the neck of the park owners.

Constrained by strangulation of revenues needed to maintain parks to the residents satisfaction and whim, and frustrated by inability to purchase the park themselves, residents find different ways to vent and channel their ill-will toward the owners, maybe towards life in general.

The "failure to maintain" lawsuit is a legal action organized and brought by a number of residents, individually named, against the management. Essentially, the claim is always that the owner did not adequately maintain the premises of the park. Geological conditions lie at the core of this case, brought against a highly respected, caring and responsible owner who did nothing wrong.

An Orange County jury has just awarded about $1.1 million to just the first 17 residents; there are about 110 more plaintiffs yet to be heard. The main complaints involve typical issues including water pressure, sewer spills, open electrical wiring, etc. Advanced Real Estate says it responded to repair calls from residents and that geological issues caused many problems plaguing the park for years. The City stopped funding efforts of the owner to obtain capital through rent adjustments to effect improvements. A rent increase sought for $50 a month failed.

According to reports (Orange County Register): "The park owner has failed to maintain the park since they bought it in 2003," Turek said. "There have been sewer spills in and around their homes and electrical problems including open wiring that shocked one woman."

Paradoxically, the residents wanted to buy the park they now claim is a nuisance. Residents also sought to purchase the park unsuccessfully from the Richard Hall Company, a well-respected experienced firm.

It is further reported that an owner representative for the Park said of the verdict: *"We're obviously disappointed."* Well, res ipsa loquitur.

In the face of possible closure, the residents had sought to purchase the park, but a contentious difference of opinion about valuation was a stumbling block. The FTM case did little, one may surmise, to improve relations with the owners.

This case continues.

* * *

JUDGE PULLS THE PLUG ON CITY-APPROVED SUBDIVISION IN GOLETA-

● *Defective Survey Undermines Approval-And the Time is Ticking on Changes in Subdivision Law.*

Subdividing a park enables home ownership by individual residents–the realization of the American dream of homeownership. Under rent controls, however, one must wonder if the residents already own the park.

Hence, in Goleta, when the City approved the park owner's application for a subdivision of the park, it was the tenants who sued the city over approval of the application to subdivide. And won. The claim was that the survey requirement was inadequate. In every subdivision request filed by the owner, there must be evidence of the results of a tenant survey, with attestation that the survey was conducted according to an agreed ballot approved by the owner and homeowner association.

> Preventing a sham conversion, one that lacks resident support, is within the realm of the City's duties.

Judge Denise de Bellefeuille issued a ruling on January 26, 2011, in favor of the tenants of Rancho Mobile Home Park, against the city's approval of an agreement for a tenant-owned subdivision. The order recites the need for a properly conducted survey of *support:*

> *"The survey results are important because they might indicate to the City that the proposed project is a sham. . . Preventing a sham conversion, one that lacks resident support, is within the realm of the City's duties. In other words, the City is more than a rubber stamp . . ."*

There was **no evidence** of an agreement between park owner and residents as to the content of the survey:

> *". . . there was no evidence that an agreement had been reached between the homeowners association and the park owners as to the resident survey to be conducted."*

In fact, the residents resisted the survey as "unilaterally" distributed to residents:

> *"Exhibit 29, in Volume 1 of 9, . . . contains the survey sent to the mobile home owners . . . Both sides agree that this survey was sent out unilaterally by the park owners . . . it is clear that the homeowners actively resisted participating in this endeavor because they had no hand in its creation."*

The survey contained a handwritten note stating *"Resident Agreed Survey,"* which was deemed hearsay and inadmissible. The Court further states the City failed

to consider the survey:

> *". . . the City did not perform its duty to consider the survey results in its vote to approve the development and send it on to the Coastal Commission for its scrutiny. [The City Attorney] argued that an absence of agreement . . . is an insignificant fact, for an owners association does not have the right to veto a condominium conversion. . ." The Court must respectfully disagree, as the record contains no evidence to support the argument made that the City considered a properly conducted survey. . . it appears that the City, . . . believed . . .that it had no discretion to question the survey's origins, composition or results."*

According to reports (*Noozhawk*, Santa Barbara, January 27, 2011) the back story is that in 2009, city fathers surmised lack of support from the state to change current subdivision law. The Governor was, in fact, rightly issuing vetoes against adverse amendments. Goleta was also facing a $20 million claim from the owner; then, Goleta approved the application and the claim was withdrawn.

This case raises an interesting question: *what if no agreement to a survey ballot can be reached?* And in the meantime, one may expect this decision to vault its way onto the Sacramento stage, boosting the tenant effort for new legislation, previously vetoed, which will be used to force a city to take into consideration the result of the survey, or worse, to require majority approval of the subdivision. This is no mere speculation. According to the City attorney, *newly sworn-in Assemblyman Das Williams has agreed to carry legislation to "clarify" the law.*

In short, the city has every incentive to stall and delay, so as to give resident lobbyists time to seek enactment of new deleterious legislation. But could it apply retroactively? In *this* park, it may not matter.

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DISABILITY DISCRIMINATION PREVENTION TO AVOID CLAIMS

– Failure to Reasonably Accommodate a Disabled Person Is a Claim Easily Avoided.

By Diane Wilkens Medina, Esq.

We are seeing an increasing frequency of cases arising from claimed failures to "reasonably accommodate" a "disabled person." Since a prevailing defendant does not usually recover attorney's fees for such cases in the Ninth Circuit, avoiding any incidence of these claims is especially important.

Mobilehome parks are "housing providers" under the fair housing laws. *Thus, Park management must be cognizant of the rights and responsibilities of the Park.* Failure to make reasonable accommodation or to engage in necessary dialogue may expose management to liability and difficulty in defense of claims.

DEVELOPMENT OF CALIFORNIA'S FAIR HOUSING LAWS

California prohibited employment and housing discrimination years before the federal laws. In 1959, the Fair Employment Practices Act (FEPA)was enacted to prohibit employers and labor unions from discriminating against job applicants and employees. That same year, the Unruh Civil Rights Act of 1959 made discrimination unlawful in all business establishments, including housing. These groundbreaking laws were followed in 1963 by the Rumford Fair Housing Act, enacted to ban housing sale and rental discrimination. California combined the FEPA and the Rumford Fair Housing Act into the California Fair Employment and Housing Act (FEHA) in 1980.

In 1988, the FHA was expanded to include familial status and "disability" as protected categories. California amended the FEHA to conform to federal law, to prohibit housing discrimination against any person because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability.

It is unlawful for management to refuse to make reasonable changes in rules, policies, practices and procedures, when such reasonable changes are necessary to allow a person with a disability an equal opportunity to use and enjoy the housing.

What is a Disability?

A person with a disability is *an individual with a physical or mental impairment that limits one or more major life activities, a person who has a record of such an impairment, or a person who is regarded as having such an impairment.*

A physical or mental impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. A major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. Included in this definition is a person *who has a record of such an impairment*, or is regarded as having such an impairment (e.g., disfigurement).

Who is Excluded:

Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance and sex offenders are not protected by fair housing laws unless they have a separate disability.

'Reasonable Accommodation' versus 'Reasonable Modification

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice or service to enable a disabled person an opportunity to use and enjoy their dwelling in a way that is equal to a person without a disability. The Park's rules or policies must be twisted, altered, or waived when necessary to accommodate a person with a disability. *Examples include* a change in the way the Park communicates with a resident, providing a designated handicapped parking space or permitting a service animal that would otherwise

violate a rule pertaining to pets.

A "reasonable modification" is a structural change made to existing premises when necessary to afford the person full enjoyment of the premises. Reasonable modifications can include structural changes to interiors and exteriors of the mobilehome, as well as to common and public use areas. Examples include widening doorways so they are accessible to persons who use wheelchairs or installing a ramp to provide access to the disabled person's mobilehome or a Park facility. Although the housing provider must allow a reasonable modification, the resident is generally responsible for paying the cost of the modification.

> The Park's rules or policies must be altered or waived when necessary to accommodate the disabled.

What is "Reasonable"?

Management is required to engage in a timely, good faith, interactive process with the person requesting the accommodation or modification to determine whether the request is reasonable and available. When considering whether to approve a request for a reasonable accommodation or modification, management may only take the following into consideration:

Is the individual making the request qualified?

Management may request confirmation from a medical provider that the individual has a disability as defined by law but may never inquire as to the nature or severity of the disability.

Is the request for an accommodation or modification reasonable? Management may ask questions which will clarify what it is about the rule or policy that serves as a barrier, so that management may offer an alternative "solution" if the requested accommodation is not reasonable. Management should not attempt to determine whether or not the request is necessary for the individual making the request; that decision is up to the individual and their medical provider. Management may request confirmation from the medical provider that there is an identifiable nexus between the requested accommodation and the individual's disability.

Undue Financial Burdens

Would the requested accommodation/modification impose an undue financial or administrative burden or require a fundamental alteration in the nature of the housing program or compelling management interests? This necessitates a case-by-case determination involving factors such as the cost of the accommodation, the financial resources of the management, the benefits the accommodation would provide the requester, and the availability of alternative accommodations that would adequately meet the requester's disability-related needs.

Potential Damages and Liability

Housing discrimination plaintiffs may recover *actual damages based upon their out-of-pocket expenses and lost housing opportunity (the plaintiff's opinion of what they would have had), intangible damages (humiliation, embarrassment and emotional distress), statutory damages (up to three times the amount of actual damages but in no case less than $4,000), injunctive relief, punitive damages and reasonable attorney's fees and costs.*

What Should You Do to Prevent a Claim?

1. Post. A fair housing poster must be posted in a conspicuous location in the Park. Posters may be obtained from any local HUD (Housing and Urban Development) or DFEH (Department of Fair Employment and Housing) office.

2. Develop. Develop and comply with a written "reasonable accommodation policy" describing how residents may request reasonable accommodations, report incidents of claimed discrimination.

3. Provide: forms to assist in making a request and in obtaining their medical provider's verification that the individual is qualified and that the request is consistent with the disability.

4. Respond. The policy should include a timely response by management. An undue delay in responding may be deemed to be a failure to provide the reasonable accommodation.

5. Dialog. Be prepared to engage in an interactive dialog to determine whether the request is reasonable and available, and document all communication. If the requested accommodation or modification is approved, document the approval in writing to the requesting individual in a timely fashion.

If the requested accommodation or modification is denied, is there an alternative accommodation or modification that would effectively address the individual's disability-related needs? Propose the alternative solution in writing. If an alternative accommodation is reasonable and meets the individual's needs, grant the accommodation.

The Bottom Line

By posting, following a written policy, and engaging in the interactive process, management will best prevent a claim of disability discrimination. Finally, *investigate insurance for discrimination*; it may avoid a costly defense, even assuming all damages are not covered.

Please feel free to call and ask us all questions. We can be reached at 714.532.2222 or 916.444.0777.

Thank you!