FEBRUARY, 2005

PARK WATCH

A LEGAL DEVELOPMENTS NEWSLETTER

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2005 NEW LAWS - -

There Seems No End To The Efforts To Over-Regulate The Manufactured Housing Industry - But, Progress Has Been Made in Expediting Rule Amendments, Towing of Non-operable Cars from Driveways.

By: Terry R. Dowdall, Esq.

▲**SYNOPSIS:** *The 2004 legislative year has brought us new laws and regulations which, in sum, are more advantageous than negative on the whole. And certainly less adverse than the potential reality based on the several anti-park owner bills which were introduced in this legislative session. WMA adroitly scuttled several dangerous bills this year, such as the "right of first refusal" bill, the right to collect attorneys fees by a city or county in defending its rent control law or administrative decisions denying rent increases, and other pernicious, indeed insidious, legislative proposals. Facing the industry this year may be, once again, an effort spearheading the claimed need for on-site management certification and licensing. We can also expect renewal of efforts for bills which were defeated in past sessions. As for this year, we have just a few new bills to know*

AB 2351, Corbett (Chapter 302)-Resident rights to Executed Rental Agreements.

This legislation amends several sections of the MRL (Civil Code §§798.16, 798.26, 798.285, 798.37, and 799.1.5) and adds one new section of the MRL (Civil Code §799.2.5) relating to various aspects of manufactured housing community operations. The bill focuses on the following resident rights:

1. Requires the management of a mobilehome park to return an executed copy of the rental agreement to the homeowner within 15 business days after the management has received the rental agreement signed by the homeowner. [§798.16(b)]. Be sure that the management does not execute the agreement prior to presenting the agreement to the tenant for execution. Management should execute the agreement after it is received from the tenant. Otherwise, it is possible that the unscrupulous tenant may make changes, deletions, or other modifications not acceptable, and then present the modified agreement as the one management must live by; or not return the agreement at all, leaving the tenant with the only fully executed original.

2. Prohibits the park management of a resident-owned park from entering a mobilehome without the prior written consent of the resident, except in specified or emergency circumstances. [§799.2.5]. This provision mirrors the requirements for all mobilehome parks. Entry onto the mobilehome space is not permitted except for emergencies, in the case of abandonment, for premises maintenance, or by consent. When drafting rules and regulations, a provision allowing for entry for purposes of inspecting the space for compliance with rules and regulations is also a prudent drafting decision. In the case of emergencies, consider waiting for the public authorities to arrive prior to entering the mobilehome if tenant distress is feared. Management can be held liable for negligent rescue (making a bad situation worse). Should the tenant expire, questions about timing and causation might arise if the manager were present. I suggest allowing the professionally trained personnel do their jobs.

3. Removal of a vehicle from the resident driveway. The bill prohibits management from removing a vehicle from the resident's driveway or designated parking space for 7 days in violation of a park rule justifying removal unless a specified notice regarding violations of park rules is posted on the windshield of the vehicle, unless the vehicle poses a specified danger. [§798.28.5(b)]. This provision resulted from an incident in which a community had a towing company drive the park periodically and tow away any vehicles without a special parking sticker or current registration. In my view, this practice constituted a practice not permitted by the Mobilehome Residency Law. The allowance for removal of vehicles from a driveway is a ground-breaking precedent in my view.

Prior to towing any vehicle (we are not talking about boats, trailers, wave runners or other such property, not at least until the operation of this bill is clarified), I suggest review of this checklist. *Remember, nothing may engender more ill will than towing a vehicle*. And in many instances, park owners are forced to defend their actions in small claims courts. Some of these cases unravel to reveal that property owners are receiving kick-backs from towing companies, that towing charges are excessive or that proper procedures were not followed. So:

*** Is there a rule and regulation which justifies removal of the vehicle for the reason stated?** The rule must not just state that all vehicles must be maintained in good and operable condition (for example); I believe the rule must specifically justify removal of the vehicle (e.g., non-operable vehicles are not permitted to be parked on the

mobilehome space and may be removed by the management in accordance with the requirements of the Mobilehome Residency Law). Many sets of park rules may not be sufficiently specific to justify removal. Merely providing that such vehicles "are not allowed" for instance may be a rule violation, but the rule states nothing about allowing removal. This is not surprising. I do not believe anyone in the industry would have such sufficiently specific rules, because establishment of this "right of removal" was never anticipated. The common wisdom previously was that the extent of rights concerning a tenant's personal property under the code was the right to charge for premises maintenance - -this was as close to the issue as existed, and that did not allow for removal of property, merely clean up of the premises. Due to legal claims against owners for removal of property, it was always cautioned not to tamper with personal property of the tenant. This remains good advice. But this bill creates a dramatic exception to that proposition when considering vehicles.

*** Are the "no parking" signs required by the Vehicle Code posted at each entrance to the park?** This code section is a subsection of general statute allowing park owners to tow vehicles from the park. I believe that for the subsection to apply, the park owner must also comply with the conditions required for towing of vehicles generally. Incidentally, the Vehicle code was revised within the past few years to require that the management's agent be present at the time of the towing. Calling the traffic enforcement agency, typically the police department of the towing, and contacting the registered owner of the vehicle if known, is also required.

*** Park-Wide Advance Notice?** I advise park wide notice that towing of non-operable vehicles will become park policy, giving the tenant time to comply and render the vehicle operative or otherwise in compliance with the rules and regulations before implementation of the policy.

Tip: *Before commencing the tow of vehicles from driveways, I suggest having an arrangement with the towing company whereby when a tow truck has a car in tow from wherever in the local community, the company be advised that you will pay a small cash prize if they will bring it into the park and drive very, very slowly around the community to "show it off," a strong message to your residents.*

Tip: *Instead of creating ill will and maybe legal issues, one owner purchases inexpensive car covers, and makes them available to subject tenants. Problem solved.*

*** Has the Offending Tenant Been Given Notice of the Rule Violation?** When management takes an action deleterious to the tenant interest, the judge will always ask–*"what notice did the tenant have that you were going to do this*?" I think abundant notice is a very wise decision. I suggest a verbal conversation followed by a confirming letter notifying the tenant of the rule violation, what needs to be done to comply with the rules and regulations, and that the vehicle will be towed if remedial action is not taken. Try to convince the tenant to agree to a specific date by which the vehicle will be conformed to the rules and regulations. Such agreement shows an agreed reasonableness of the rule; it admits the work needs to be done. If the work is not performed, I suggest further contact, or a warning notice. The warning should be carefully drafted so that it does not offend the judge who may eventually read it. I do not suggest a seven day notice to cure rule violations; it may be later argued that management had elected to termination of tenancy for rule violations and by so doing, waived the remedy of towing the vehicle. The notice should give still more time to cure the rule violation. If after these efforts the tenant still fails to cure the rule violation, the next steps can be taken.

*** [(b) (1)] Did management post the windshield of the vehicle with a notice stating management's intent to remove the vehicle in seven days and stating the specific park rule that the vehicle has violated that justifies its removal?** This notice is under development at this time. I believe the notice should state the rule violated which justifies removal; the pertinent law; the number and dates of former warnings or agreements to cure which have been violated; the date on which the vehicle will be towed; and, the right to remove without further notice if the vehicle is returned to the parking space or driveway still in violation of the rules and regulations.

*** Did management take photographs of the vehicle from all angles and views of the vehicle?** The chances are the vehicle is not in good condition in any case. If damaged in transit, the tenant may argue that pre-existing damage was caused by the tow operator (and for which the management can be held responsible). If the violation of the rules is visible, a picture of that is also a good idea (expired registration, flat tires, fluid leaks, etc.).

*** Did management take a picture of the notice affixed to the windshield?** The language of the notices need not be legible in the photograph, but it is important to show the posting of the notice. I also advise serving the tenant with a copy of the notice. Especially in all age parks, posted notices have a way of disappearing before the intended recipient actually receives it.

Tip: *If within the seven day period a good faith effort is made to comply with the violated rules, yet the repair is incomplete, consider a second notice prior to towing to allow complete cure. The tenant may argue that when towed, the vehicle did comply with the rules and regulations. Some vehicles may have been sitting for prolonged periods of time, and therefore allowing additional time for complete cure will be a reasonable thing to do, and avoid unnecessary ill will.*

If a vehicle rule violation is corrected within seven days after the rule violation notice is posted on the vehicle, the vehicle may not be removed.

*** Did management take pictures of the vehicle at the time it was towed?** I advise a further set of pictures of the vehicle at the time is towed to show that there is no change in its condition, from the initial posting, to the time it is actually towed. After the expiration of seven days following the posting of the notice, management may remove a vehicle that remains in violation of a rule for which notice has been posted upon the vehicle.

If a vehicle upon which a rule violation notice has been posted is removed from the park and subsequently returned to the park still in violation of the rule stated in the notice, management is not required to post any additional notice on the vehicle, and the vehicle may be removed

after the expiration of the seven-day period following the original notice posting.

Finally, if a vehicle poses a significant danger to the health or safety of a park resident or guest, or if a homeowner or resident requests to have a vehicle removed from his or her driveway or designated parking space, the requirements of paragraph (1) do not apply, and management may remove the vehicle pursuant to Section 22658 of the Vehicle Code. *I would still provide advance warning notices.*

4. Goods and Services Cannot be Required to be Obtained from any Specific Contractor. The bill also prohibits park management from requiring a resident to purchase goods or services from any third party for remodeling or maintenance. [§798.37]. In other words, management cannot require the employment of any particular contractor. Tenants can be directed to the state contractors' license board to check for complaints and proper licensing *(http://www.cslb.ca.gov/)*. Other residents might be consulted if management knows of a reputable job performed for other tenants. I would not suggest any particular contractor under any circumstances. And the proposed tenant choice of a contractor cannot be vetoed by the management. "Blackballing" of any one doing business with a tenant in the park is not legally permitted. This prohibition also extends to brokers, dealers, and salespersons.

AB 2581, Lieber - Involuntary Park Conversions

This Assembly Bill amends Section 65863.7 of the Government Code, relating to manufactured housing communities conversions. The legislation specifically provides:

1. That when a mobilehome park is closed or converted to another use as a result of the park's permit to operate being suspended by HCD or an enforcement agency for noncompliance with code enforcement orders under the Mobilehome Parks Act, the park owner shall be responsible for preparing the conversion impact report and implementing mitigation measures that may be required by the local government.

In the event that a park owner operates the park so poorly that the enforcement agency threatens to revoke the permit to operate, the law deems that a conversion or cessation of use is taking place. This requires the park owner to pay relocation benefits to the tenants, and accordingly to prepare the relocation impact report typically required for park closure. The purpose of the relocation impact report is to micro-analyze new target destinations for each of the homes in the park and the attendant economic entitlements to be paid to the tenants and their family members for inconvenience. Many ordinances also require payment based on current value of the mobilehome if there are no identifiable target destinations, which is often the case. This is so at present in an "up" market, when only new mobilehomes are allowed entrance into a mobilehome park.

The scenario painted by the statute presupposes other adverse consequences. If the park is being forced to close, it is likely the park owner is a prime candidate for a mass-plaintiff failure to maintain action by the residents, and a prosecution by local authorities for maintaining a nuisance. Thus, if closure is compelled, the relocation impact report is unlikely to be approved until it unduly and grossly favors the tenants with financial entitlements.

The "short take" on this statute is that no park owner should be put into this intractable dilemma. Either make the improvements required to keep the park operating within code, or undertake closure at your pace, coupled with a new development which may be desirable to the city fathers and yield more favorable and equitable treatment from city fathers.

SB 1090, Dunn (Chapter 567)-Mobilehome Dealer, Sales Practices

This Senate Bill amends Section 798.71 of the Civil Code, amends Sections 18024, 18060.5, 18062.2, and 18063 of, and adds Sections 18014.5 and 18061.6 to, the Health and Safety Code, relating to manufactured homes and mobilehomes. This bill makes the following changes to the laws governing the sale of mobilehomes by dealers:

1. Makes it illegal to require a seller (resident or heir, etc.) of a manufactured home in the community to hire management or a specific broker or dealer/salesperson to handle the sale of the home. This is really a reaffirmation of the existing law as we have known it. Management cannot force a tenant to list a mobilehome with any particular dealer or broker, not even if management has had bad experiences or poor rapport with the agent in the past. Black-balling someone from doing business with a tenant is not permitted.

2. The bill makes various changes relating to "net listings." This legislation is long overdue, but regrettably does not go far enough. A "net listing" is an agreement for a listing of a mobilehome for sale, wherein the seller agrees to receive a set amount for the mobilehome, and the agent receives the balance of the purchase price as a commission. These agreements are subject to gross and pernicious abuse of the unsophisticated. Often, the seller does not know the true value of the mobilehome and agrees to accept much less than the real market value, resulting in a windfall to the listing agent.

Now, it is an unlawful business practice to enter into a net listing agreement without disclosing in writing certain information - including but not limited to the fact that the buyer's offer may be in excess of what the seller has agreed to accept and that the dealer may retain any amount in excess of the amount to which the seller has agreed. The bill further requires the dealer to disclose (after the offer has been accepted but before the escrow closes) the exact amount of the buyer's offer and the specific amounts of any commission.

Unfortunately, when the seller finally "wakes up" and sees the amount of the commission earned, it is too late to stop the transaction from going forward. If the seller refuses to perform, the agent may sue for a very sizeable commission, and the seller would lose the case, absent a claim or defense of fraud, concealment, deceit or similar claim. In such cases, it is clear that seller would have been deceived but with proper disclosures, there is no regulation on the size of the commission, and therefore it is likely the seller would be defeated in such litigation. This statute as drafted sets the stage for much litigation stemming from net listing practices. I believe that once the size of the commission is disclosed, the seller ought to have the election to switch to a customary percentage commission option.

3. On model, display, or other occupancy units, the bill requires that (1) if the dealer wishes to sell it as a new home, the dealer may post that information at the entrance to the home as well as have that information provided in the purchase agreement of the unit; and (2) that in any advertisement of a new home the year of manufacture is not required to be listed, provided the new unit is not more than three years old and that the advertisement need not mention the model name if the name is disclosed in the purchase agreement for that unit.

4. This bill further makes it illegal for a dealer or salesperson to violate certain provisions of the Mobilehome Residency Law relating to listing or showing the homes and the residency approval process (798.71 and 798.74 of the Civil Code). Further, if the dealer is the owner or manager of the community, or an agent of that owner or manager, it is a violation of the dealers' laws to violate the MRL relating to the transfer of manufactured homes in the community. (798.72, 798.73, 798.73.5, 798.75.5 or 798.83 of the Civil Code).

SB 1163, Dunn -Utilities

This Senate Bill amends Section 798.38 of the Civil Code and Section 739.5 of the Public Utilities Code, relating to utilities and manufactured housing communities as follows:

1. It requires the California Public Utilities Commission to take and respond to complaints relating to master-meter utility providers. The bill requires that the PUC, in responding to the complaint, shall consider the role that the office of the county sealer in the complainant's county of residence may have in helping to resolve the complaint, and where appropriate, coordinate with that office.

2. It also requires communities that use a third-party billing agent to prepare utility bills to disclose to their residents in their utility billings the name, address and phone number of the billing agent.

SB 1176, Dunn -Omnibus Bill

This omnibus Senate Bill affects several portions of the MRL and Health & Safety Code, amending Civil Code §798.25 and H&S Code § 18420 and making various changes to H&S Code §18552 as follows:

1. Allows park management to implement changes in park rules and regulations mandated by law following written notice of at least 60 days without meeting and conferring with the homeowners. [Civil Code §798.25].

This bill sidesteps the usual rule amendment procedure. Ordinarily, there are four steps to implementing a change in the rules and regulations.

FIRST STEP: Select a date for a meeting with the residents at least ten days in advance. This meeting is for the purpose of receiving input about the new rules and regulations. Deliver a copy of the "initial" notice of the meeting date and rules to each of the spaces. I suggest this be done by hand delivery (a proof of service to fill out, in roster format, as each tenant is given the letter with attached rule amendments is suggested).

SECOND STEP: Conduct the scheduled tenant meeting. At the end of the meeting, the residents can sign the new rules if they choose. Most will not sign. If the residents make good suggestions you may desire to further modify the proposed rules. If so however, those latest changes must, again, be subjected to the initial notice and meeting requirement.

THIRD STEP: Deliver a copy of the amended rules AGAIN to all the tenants. In other words, the tenants will be getting two copies of the rules and regulations: once at the time of the initial notice and a second time after the meeting.

If a tenant does not sign the amendment, it becomes effective six months after the "final" letter and amendment is served. As to recreational facilities, the rules become effective 60 days after final service. This is why it is very important that the rules be served and documented. Otherwise, six months from now, a resident may claim never to have received the rules.

FOURTH STEP: Wait six months to enforce the rule and regulation. Until the 6 month period has run, the old rule (no late charge) remains effective. Once the six month period has passed, the new rules may be enforced whether or not the tenants have signed them.

For minor or technical changes to the rules and regulations, a simple sixty day notice to the tenants is all that is required to change the rules and bring the rules into compliance with the applicable law mandating the change. Remember, the use of the sixty day notice is for changes required to be made by law, not merely because a new law gives the park owner a right which did not exist before (such as the right to tow vehicles from a driveway). An example might be the sublease law that took effect last year. If this bill had been in effect, a sixty day notice modifying a "no subleasing" rule might be permitted, to provide for subleasing mandated by the MRL (for medical hardship situations). I suggest considering usual rule amendment procedure where definition of procedure is useful. In the sublease situation, the park owner may wish to verify that the home is not rented out for more than the space rent utilities and mortgage payment, also the management may want the right to approve the sublessee. Enforcing these rights requires additional language which cannot be instituted by sixty day notice.

2. Code Violations and time to cure: This bill reduces the time that a mobilehome park owner or a resident has to eliminate a violation of the Mobilehome Parks Act (Title 25) after receiving a notice of violation from 90 days to 60 days. The bill provides that if a violation is not corrected due to a valid reason, the enforcement agency can extend the time for correction by 30 days or by an additional reasonable period. [H&S Code §18420]. For imminent hazards, a time specified by the inspector will be specified.

If on reinspection of a violation, the enforcement agency determines that there is a valid reason why a violation has not been corrected, including such exigencies as weather conditions, illness, availability of repair persons, or availability of financial resources, the enforcement agency may extend the time for correction, at its discretion, for 30 days or an additional reasonable period of time after the 60-day period. I suggest that these sections will likely never apply to the park owner but only to the affected tenant.

SB 115, Torlakson -Cash payments

This new legislation adds Section 1947.3 to the Civil Code, which provides:

That a landlord or manager may not demand or require cash as the exclusive form of rent payment or security deposit payment, as opposed to checks, money orders or other forms of rent payment, unless the tenant's rent check

has bounced or tenant has stopped payment on the check. When use of the demand for cash is allowable, the demand cannot exceed a period of three months. This will not affect park owners in most cases, as most park owners do not take cash, for several reasons, among the most important considerations being the security risk of handling potentially thousands of dollars in the park office. This does not affect the ability to demand payment by money order or cashier's check however, as many rental agreements allow.

SB 1145, Burton -Tenants' rights in Park-Owned Rentals

This Senate Bill applies to park-owned rentals only, and made various legislative changes preserving previously temporarily granted tenants' rights. The legislation amends Civil Code §§1950.5, 1954.52, and 1954.53; Code of Civ. Proc. § 1161.2; and, Gov. Code §7060.4. In addition the bill amends and repeals Civ. Code §827 Gov. Code § 12955.

Significantly, this bill repeals the sunset date of various landlord-tenant provisions that were enacted within the past few years with either a 2005 or 2006 sunset date, making these laws permanent. *The provisions include requiring landlords to give tenants a 60-day, rather than additional 30-day, notice of a rent increase that is more than 10% in a one-year period and a law prohibiting landlords from discriminating against prospective tenants because of source of income.*

Other Legal Developments:

Andrews Case:

In a lawsuit between two feuding tenants, who blamed the park owner for not taking action to stop the interrelated harassment of one another, the court said the park owner could be held liable to the tenant claiming to have been victimized if the interference with quiet possession was substantial. That action can be a warning, or a suit for injunction to stop the feuding if sufficiently serious, or in even more serious cases, an eviction for substantial annoyance. In the worst case of violent confrontation or criminal conduct, a call to the authorities to stop criminal activity between the tenants is also expected.

Specifically, the Court mentions the management's ability to obtain injunctive relief. The opinion talks about injunctions for "violation of a reasonable rule or regulation," and an established rule is therefore necessary as a predicate for relief by injunction in this situation. "Peace and quiet" rules may not be enough depending on the nature of the harassment.

Other problems remain with these "Hatfield and McCoy" situations - which tenant to evict? Both? This should be unnecessary because elimination of one tenant might solve the problem. If both tenants are sued, the park owner probably loses one case once the "chicken and egg" causation issue is adjudicated by the jury as an issue of fact ---with resultant attorney's fees and costs awards, plus maybe malicious prosecution from the prevailing tenant; also now management must deal in the future with a tenant feeling empowered and invulnerable to rule enforcement measures.

I think the opinion makes it clear that breach of quiet enjoyment constitutes a "substantial annoyance." This is very nice. I believe it lowers the bar as to burden of proof for eviction on this ground. However, we would need the cooperation of the victimized tenant. Tenants do not always cooperate as we all know. If management sues both tenants for eviction, the owner will get cooperation from neither of them. That is a roller coaster ride no practical attorney would wish to risk.

For these reasons, park owners should more often consider injunctions as a way to separate the feuding parties. The advantages are patently clear: no jury; no pressure on the part of the judge as to the "loss of the home" issue; rather, all management would be seeking is an "Oh Do Behave!" order (quoting Austin Powers); there is little or no time for discovery; and, the law allows for the recovery of attorney's fees and costs.

Injunctive relief is therefore the fastest, most economical and low risk remedy available to the park owner. The real issue is when the feuding and disruption or interference with the right to a reasonably quiet and uninterrupted tenancy becomes "substantial." And indeed, once an award of attorney's fees and costs is granted, the tenant sometimes decides to move on and sell.

Ohana v. 180 Prospect Place Realty Corp.:

With the Andrews opinion, here is another facet where the property owner can be sued---an FHAA violation in a "Tenant v. Tenant" situation.

The fair housing laws prohibit interference with the enjoyment of fair housing rights, and can serve as a separate basis for a claim even if a plaintiff does not have a claim under another section of the act.

Plaintiffs, who are Jewish and of Middle Eastern origin, moved into an apartment. According to their complaint, after they moved in, their next door neighbors engaged in a series of discriminatory acts against them because of their race, religion, and national origin. Plaintiffs charged that the neighbors threatened them with bodily harm, used racial and anti-Jewish slurs, and banged on the walls and hammered late at night while shouting "Jews move." On one occasion, Jackson shouted at Stern that "she was not black enough to live in the building" and threatened to have her killed. Plaintiffs claimed that they notified the owner but no action was taken to stop the harassment. Plaintiffs moved out of the building a year after they moved in.

The judge stated that the claims were valid if proved, under the law stating specifically that "threatening, intimidating, or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons" is prohibited.

If ever a park owner or management is notified or discovers that one tenant is harassing, bothering, or acting against another due to any protected fair housing status, the foregoing remedies as discussed in the Andrews situation should be explored with counsel. Additionally however, a DFEH or HUD complaint should also be filed as soon as possible against the offending tenant(s).

As we see from these cases, the management of a mobilehome park may be held liable for standing idly by and taking no action to intervene in tenant feuding or harassment based on protected class characteristics.

PLEASE FEEL FREE TO CALL TERRY R. DOWDALL FOR QUESTIONS OR COMMENTS ABOUT THE FOREGOING ISSUES.