

The Marin Lawyer

An Official Publication of the Marin County Bar Association



GENERAL MEMBERSHIP MEETING WHERE WILL YOU BUY YOUR ELECTRICITY NEXT YEAR?

SUPERVISOR MCGLASHAN ANSWERS YOUR QUESTIONS ABOUT MARIN CLEAN ENERGY AT MAY 27 GENERAL MEMBERSHIP MEETING

PG&E may soon be facing competition from local Marin governments. How will this affect you, your clients, and your practice? Learn about Marin Clean Energy from Marin County Supervisor Charles McGlashan, one of the county’s leading proponents of environmental sustainability.

On **Wednesday, May 27, 2009**, beginning at 12:00 noon at **Jason’s Restaurant** (300 Drakes Landing Road, Greenbrae), Sup. McGlashan will explain the work of Marin Energy Authority (MEA). MEA, comprising the County and eight Marin cities, is building a program to buy renewable power directly from the market for county residents. The MEA, with its Marin Clean Energy initiative, expects to secure a clean energy supply, price stability, energy efficiencies, local economic benefits and a significant reduction of the county’s greenhouse gas emissions.

How will Marin Clean Energy locate and purchase energy, and how will the program be funded? What role will PG&E retain in the county? Will Marin residents have a choice of energy providers or type of energy purchased? Be among the first to find out.

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Calendar of Events

May 27th
General Membership Meeting
Jason’s Restaurant, Greenbrae
12 – 1:30 pm

May 19th
Law Day
7-9pm

May 20th
ADR Section Meeting
12 – 1:30 pm

May 20th
Probate & Estate Planning Section Meeting
12 – 1:30 pm

May 21st
Real Property Section Meeting
12 – 1:30 pm

Look for details each month in
The Marin Lawyer

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Sara B. Allman was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2009.

NEW “LANDMARK” CALIFORNIA DISABILITY ACCESS LAW HAS UNCERTAIN FUTURE

By Sara B. Allman, Esq. *
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The California Legislature recently enacted bipartisan legislation designed to encourage compliance with disability access laws while minimizing business owners’ exposure to “shakedown” ADA lawsuits. The legislation (SB 1608), praised by some as “landmark,” was signed by Governor Schwarzenegger last October. Most provisions took effect January 1, 2009, with implementation of other provisions delayed to July 2009. The law adds new provisions (found in the Civil Code, Government



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Sup. McGlashan is in his second term as a member of the Marin County Board of Supervisors. His work is focused on sustainability in all facets of public policy: energy efficiency and renewable power, water conservation, affordable housing, local non-car transportation systems, bicycle and pedestrian improvements, smart community design, zero waste, green building, justice, public health, and habitat protection. In addition to serving as chair of the Marin Energy Authority, Sup. McGlashan chairs the Sonoma Marin Area Rail Transit Authority (SMART), chairs the Richardson's Bay Regional Agency, and serves on many other intergovernmental and environmental agencies. He holds a B.A. from Yale and an MBA from Stanford, both awarded with honors.

Seating is limited; early reservations are recommended. Please register for this exciting program by completing and returning the reservation form on page 2, or by calling or e-mailing Robynn Gaspar at (415) 499-1314 or rgaspar@30nsp.org.

(Disability, continued from page 1.)

Code, Health & Safety Code, and Business & Professions Code) to existing state disability access laws.

The new law establishes a 19 member California Commission on Disability Access – a committee intended to monitor disability access compliance, act as an information center, make recommendations to the Legislature on changes to disability access laws, develop a checklist for inspectors to use in determining disability access compliance, and study and report to the Legislature on whether the state's programs are meeting the needs of the disability and business communities. (Government Code § 8299.01.) Many of the new provisions added to the Civil Code become operative only upon issuance of a notice by the Director of Finance declaring that the California Commission on Disability Access has been funded (a meager \$80,000 has been appropriated from the General Fund for this purpose) and has commenced operations. The funding and operation of the Committee could be a big "if," given the state's present economic woes.

Among other things, the new law provides that owners and tenants of public accommodations may obtain (at their own expense) an inspection by a certified access specialist (CASp). (Civil Code § 55.53.) The CASp is required to notify the business owner of the right to a written report of the inspection. The CASp may then issue either 1) a certificate of full compliance or 2) a report that identifies required corrective measures and a timetable for completion of the remediation. The business owner may post a CASp certificate of compliance in the window of its business to signal compliance with access laws and thereby (it is hoped) discourage the filing of a lawsuit.

With respect to any complaint filed on or after January 1, 2009, any business that has obtained a CASp certificate or report may apply to the court to obtain a stay of the action for 90 days and an early evaluation conference to attempt to resolve the case short of protracted litigation. (The stay would apply only to the accessibility claim, not to other causes of action pled in the complaint. The stay provisions also would be inapplicable where the plaintiff has obtained temporary injunctive relief in connection with an accessibility claim.) After an early evaluation conference is set by the court, the defendant must file and provide the plaintiff with a copy of the CASp report. Following that, the plaintiff must provide the defendant with a list of claimed violations, damages and attorney's fees. The Legislature has directed that the Judicial Council prepare and post on its website forms and instructions to help the parties implement the law. (Civil Code § 55.54.)

Under the new law, attorneys who demand money directly from a business to resolve disability access claims must also provide the business an advisory statement (on a form to be developed by the Judicial Council) regarding their legal rights, including an explanation of the right to a stay and early evaluation, as well as their legal obligations to comply with state and federal disability access laws. (Civil Code § 55.3.)

The legislation also clarifies that statutory damages under the Civil Code may be awarded only for the occasion(s) on which the plaintiff personally encountered a barrier to, or denial of, access. Damages are not awardable for each technical violation of a construction standard. (Civil Code § 55.6.) A court may also consider prior written settlement offers made or rejected by a party in determining the propriety of an award of attorney's fees in a disability access case. (Civil Code § 55.55.)

The new provisions attempt to ensure that California architects and building officials become more knowledgeable regarding disability access requirements. Architects will now be required to complete coursework as a condition of renewal of their state license. (Business and Professions Code § 5600.) Building officials will also be subject to continuing disability access education requirements. (Health & Safety Code § 18949.29.) Every local building department will be required to employ or retain a CASp. (Civil Code § 55.53.) Furthermore, the State Architect is required under the new law to develop access standards equal to or greater than those specified in federal guidelines. (Government Code § 4450.)

The significance of this legislation is uncertain. The law does not give businesses a safe harbor or notice and opportunity to correct access deficiencies before a lawsuit is filed. Assuming the California Commission on Disability Access is funded and becomes operational, commercial

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property owners and tenants (who can afford it) may be motivated to hire a CASp so that they can address access issues, post a compliance certificate, and hopefully avoid a lawsuit or mitigate its impact. As a result, greater access may be achieved for the disabled community. The provisions of the law which require certification and greater continuing education for architects and building officials could also have a positive effect on disability access. The clarification on recoverable damages and attorney fees determinations might assist California businesses who are sued in disability access actions and who typically are not covered by the average CGL insurance policy.

Conceptually, the stay and early evaluation provisions of the law should decrease attorney's fee exposure for businesses sued in state court. But, as it stands now (and in the experience of the author) most ADA lawsuits are brought in federal court under federal law with state law damages claims tacked on. The procedural aspects of state law cannot be imposed on the federal court. Moreover, the Northern District has already implemented a stay and early evaluation program for its disability access cases. The true impact of this complicated legislation on ADA litigation thus remains to be seen.

**Sara B. Allman practices general civil litigation with an emphasis on defense of commercial property owners and tenants in disability access cases in state and federal court. She is a principal of Allman & Nielsen, P.C., in Larkspur and can be reached at (415) 461-2700 or at allniel@comcast.net.*

Superior Court of California County of Marin

Notice

Revision of the Uniform Local Rules of Court (California Rule of Court 10.613)

The Judges of the Marin County Superior Court have approved a draft set of proposed Local Court Rules. As authorized under CRC 10.613, they are posted on the internet at the following web page address of the Court:

<http://www.marincourt.org/data/PDFs/ULRD.pdf>

Should an individual or organization not have access to the internet, a printed copy of the local rules of court may be obtained at no charge by writing the Court at:

Marin County Superior Court
Court Executive Officer
Attn: Local Rules of Court
P.O. Box 4988
San Rafael, CA 94913-4988

Written comments or proposed changes should be submitted to the above address no later than May 8, 2009 by 4:00 p.m. Should you need additional information regarding the revision of these local rules, please call the Office of the Court Executive at (415) 473-6244.

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