



HUNTINGTON MARINA RESIDENTS' NEWSLETTER

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SEA WALL/EROSION LAWSUIT UPDATE PHOTOGRAPHS AND PUBLIC DOCUMENTS REVEAL FACTS

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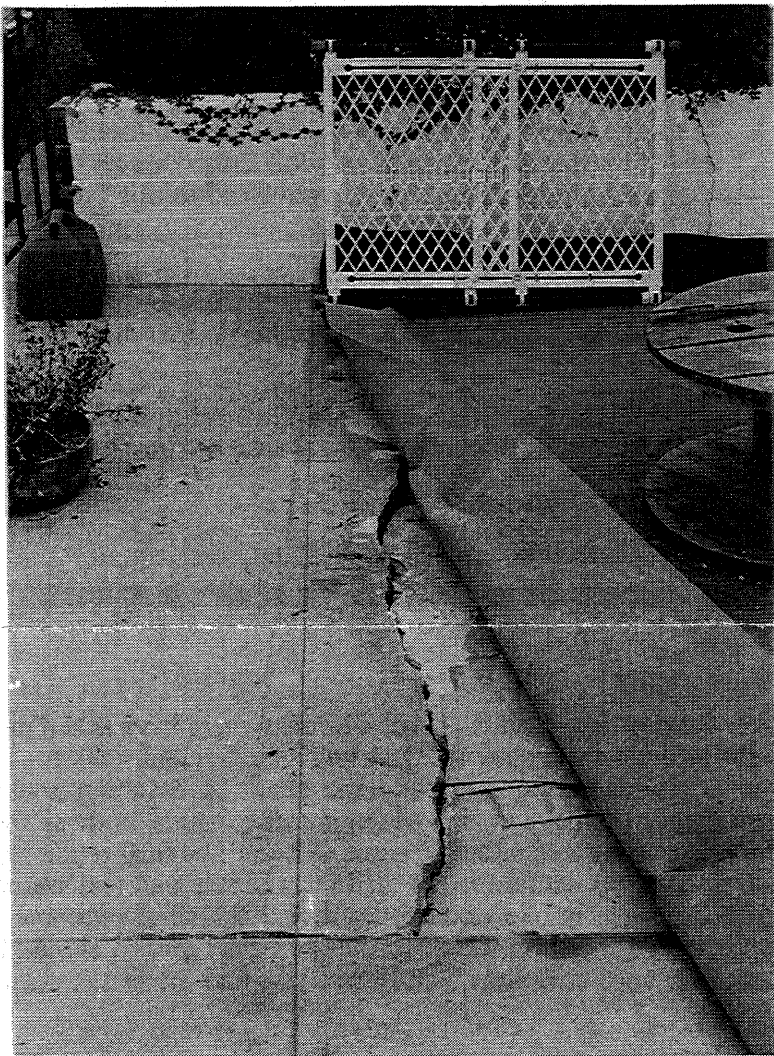
Over the past few months, several homeowners have asked me about the cause and the outcome of the recent lawsuit against HMA and an individual seller regarding the sea wall/erosion problem that exists in our complex and the resulting cracking and sinking of waterfront patios and breezeways. I have reviewed public documents both at the Courthouse and at the City of Huntington Beach Building Permit Office. The final repair report, given to all Board members, also documents actual repairs made to the sea wall and waterfront patios at 16080, 16088 and 16092. These public documents reveal the final outcome of the lawsuit, and they contain important information which you, as an HMA owner, should know. This newsletter is intended to answer your questions, and I hope you find the facts informative and helpful.

Court Orders Seller to Pay Buyer Compensatory Damages for Failure to Disclose HMA's Sea Wall/Erosion Problem

If at any time you are planning to sell your condominium, be sure you fully comply with real estate disclosure laws, or you may be subject to a lawsuit. As revealed in public documents I reviewed at the Courthouse, the seller of 16088 was sued for failing to fully disclose a soil erosion and cracking patio and sinking breezeway problem. Specifically, the seller was charged with: (a) breach of contract, (b) fraudulent deceit (concealment/suppression of fact), and (c) fraudulent deceit (affirmative misrepresentation).

Court documents and HMA records reveal the following:

- The seller of 16088 had repeatedly requested, both at HMA Board meetings and in written letters to the Board, that the sinking breezeway and cracking patio at 16088 be repaired.
 - ⇒ According to minutes of a 9/9/91 HMA Board meeting, the seller of 16088 advised the Board that the breezeway at that unit is sinking, ("about 3 inches so far") and asked what the Board was going to do about the damage being caused to his patio by this sinking. According to the HMA meeting minutes, Director Hugh Caille indicated *"the Board has talked about the sinking problem in the past,"* and Caille proposed that an expert such as Olen Murray (a civil engineer) be brought in "to review the sinking problem".
 - ⇒ In October 1991, HMA received a report from civil engineer Olen Murrey. The report identified a progressive soil erosion problem and recommended further investigation and repair. Adjacent is one of several photographs of 16088 taken by Olen Murrey, before HMA subsequently covered-up the sinking/cracking patio and breezeway with a cement patch.
 - ⇒ A letter dated 2/10/92 from the seller of 16088 to HMA again asks what HMA is going to do about the sinking sidewalk which is



causing more and more damage to the adjacent patios and at other units. The letter states, "lack of action by HMA to this repeated request adds to problem."

- ⇒ A letter dated 3/8/92 from HMA's President to other HMA Board members states, "The question of the sinking patios needs to be addressed."
- ⇒ A letter dated 6/10/92 from the seller of 16088 to all HMA Board members states, "When is the Board of Directors going to address the cracking patios and planters? I have specific problems with the waterfront patio (cracking), breezeway sidewalk (sinking in front of the gangway). These problems are as important to me as I am sure other problems are to other owners and I would like to have them addressed right along with other problems instead of being swept aside each month (as in the past six years) when the Board meets."
- ⇒ HMA meeting minutes dated 7/13/92 indicate the seller of 16088 had been requesting that the Board do something about the sinking/cracking patio and breezeway for some time. According to the minutes, HMA's President asked him if he could please give the Board two more months. The seller said he was making a big issue of this because "if it continues it could cause major structural damage to the building and I know many other patios are getting such cracks."
- ⇒ A letter dated 7/22/92 from HMA's President to the seller of 16088 indicates, "HMA is already addressing the issue of the sinking patios and sidewalks... To tide you over, your patio may be patched in the same manner the sidewalk was patched. But that is only a temporary measure (emphasis added); we are working toward making the proper repairs within the next few weeks." HMA never followed up to make more permanent repairs.
- ⇒ According to HMA records, Jeff and Augustine put a concrete patch over the sinking/cracking patio and breezeway at 16088 in July 1992.
- ⇒ In October 1992, unit 16088 was sold to the current owner. In his Real Estate Transfer Disclosure Statement of 9/29/92, the seller stated, "Waterfront patio slab had cracks - were repaired satisfactorily and Home Association did complete check and reported no erosion of dirt under patio area." As revealed in the Court records, the seller also completed Section II, paragraph C of the Disclosure Statement stating that he was not aware of any settling from any cause or slippage or other soil problems. No mention was made of the sinking nor the "temporary" repairs.
- ⇒ According to Court documents, on July 6, 1998, the seller was ordered to pay the buyer of 16088 compensatory damages, plus interest, for: (a) loss of use of the waterfront patio for 25 months, (b) diminished value of the condominium resulting from the lawsuit and HMA's sea wall/erosion problem, (c) costs associated with future repairs of other units and related assessments, and (d) attorney fees.

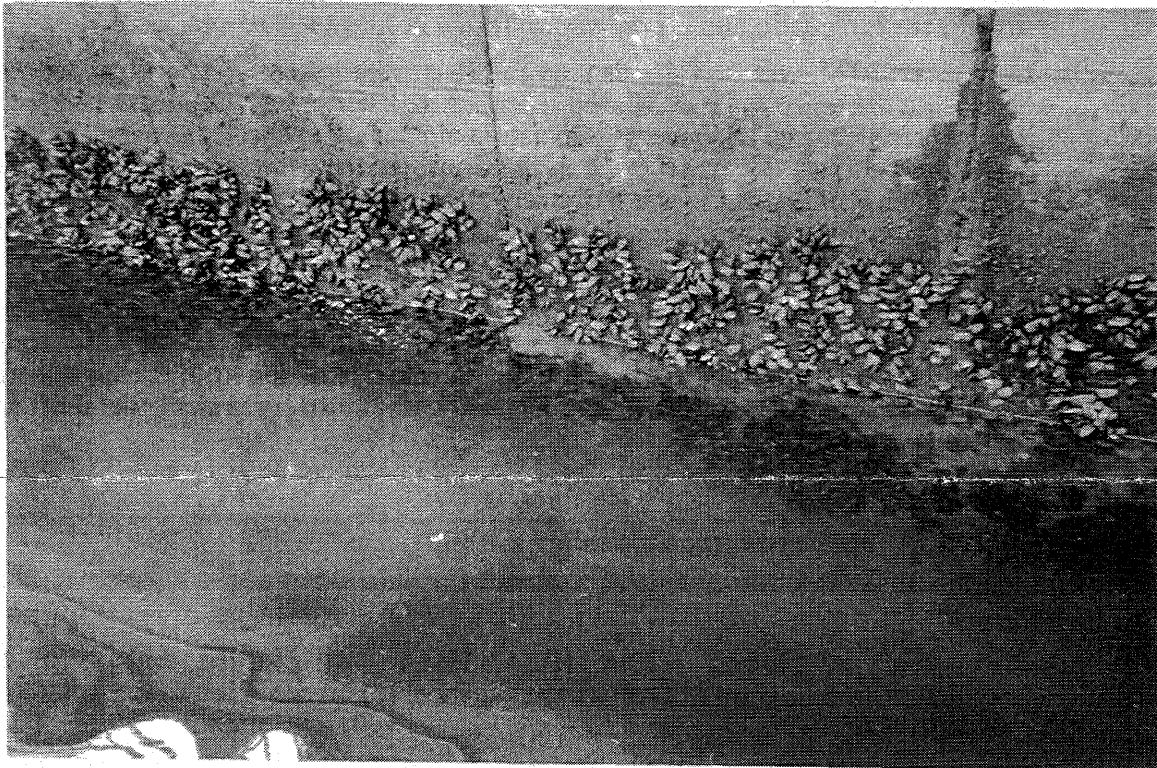
Chronology of Events Leading to Lawsuit

In the portion of the lawsuit against HMA, HMA was charged with: (a) fraudulent deceit/concealment (suppression of fact), (b) negligence, (c) breach of contract, and (d) breach of fiduciary responsibility.

HMA tried twice to have the case thrown out of court. HMA argued that an individual homeowner does not have legal standing to challenge the way a homeowners association chooses to conduct maintenance and repairs. However, **the judge ruled in favor of the homeowner**. Unfortunately, for the seller, the buyer and the rest of us, had HMA followed the recommendations of its Sea Wall/Patio Committee, I believe the lawsuit and thousands of dollars in associated costs to

homeowners could have been avoided. Public documents reveal the following chronology of events:

- In mid-1994, cracks in the waterfront patio at 16088 began to reappear and enlarge. In October 1995, the owner of 16088 discovered the significance of HMA's "temporary" cement patch, i.e., there was a void underneath it which measured approximately 3 feet deep, by 2 feet wide, by 6 feet long.
- After discovering the large void, the owner of 16088 repeatedly requested that HMA undertake proper repairs. One of HMA's current Board members reportedly told the owner (back in 1995), *"Get used to it, concrete cracks."* Several past and present Board members said maintenance and repair of waterfront patios was the owner's responsibility, not the Association's. Several homeowners, including the owner of 16088, requested permission to form a committee to research and make recommendations about the soil erosion and cracking/sinking patio problem. Permission was granted, and I chaired the committee, which later became known as the Sea Wall/Patio Committee.
- During the course of the Sea Wall/Patio Committee's investigation, through both consultation with several sea wall/structural engineers and contractors with expertise in sea wall design, construction and maintenance, as well as our own direct observations, we discovered the cause of the patio subsidence problem: **Soil was eroding out through the joints between the vertical cement slabs that make up the sea wall. The sea wall joints (which occur about every four feet laterally between vertical cement sections) were allowing sand and soil to erode out through the joints each time the tide came in and then went out.** The following photograph shows soil eroding out through joints in the sea wall at 16088:



- In 1995, the Sea Wall/Patio Committee provided a report to HMA's Board of Directors. Based on consistent input from numerous sea wall/structural engineers and contractors with expertise in sea walls, the report recommended that certain remedial action be taken by HMA. Recommended repairs included sealing of the sea wall joints using a low pressure grouting process and refilling/recompacting the soil underneath the patio to sufficient levels. Total repair costs were estimated at approximately \$4,000/patio, based on bids received from contractors. The low pressure grouting process is a routinely-used method of repairing sea walls and has been used successfully at several other locations within Huntington Harbor and elsewhere.
- HMA chose not to follow the recommendations set forth by the Sea Wall/Patio Committee and the sea wall/structural engineers. HMA objected to using low pressure grouting to seal the sea wall joints.
- HMA disbanded the Committee, put Paul Smith and Hugh Caille in charge, and hired Mike Burrous of Summit Consultants and Keith Tucker of Norcal Engineering (a soils engineer). None of these individuals were structural/marine engineers with prior experience in sea wall design, construction and/or maintenance.
- In April 1996, HMA demolished and removed the concrete patio slab, planter boxes, plants/hedge and fences at 16088. HMA indicated it planned to use 16088 as a "prototype" to see what could be learned about the problem and to develop a repair plan that could be used throughout the remainder of the complex. The large void and soil erosion was confirmed (see the adjacent photograph) when HMA removed the waterfront patio. It progressively worsened as HMA left the patio exposed:
- ♦ In July 1996, Keith Tucker (the soils engineer hired by HMA) provided HMA with a report and recommendations. **Keith Tucker's report states, "The probable cause of the settlement is ground loss through the vertical joints in the sea wall during numerous tidal fluctuations along the Harbor area."** The report identified several waterfront patios that are experiencing noticeable cracking and distress (specific unit numbers are designated in the report).



The report noted that many patios are covered with tile or brick, possibly concealing otherwise visible signs of distress. The report also confirmed substandard soil conditions at 16088 (i.e., a loss of soil and soil compaction less than code requirements). **Rather than the low pressure grouting process that was consistently recommended by sea wall experts and structural engineers, however, Keith Tucker recommended installing a "6-foot fabric filter". HMA was strongly advised by its former Sea Wall/Patio Committee NOT to follow Keith Tucker's recommendations** because:

- ◊ The sea wall is taller than 6 feet, and soil would continue to erode out underneath the fabric filter;
 - ◊ To install a filter the entire height of the sea wall would require expensive shoring and excavation, which would be cost prohibitive;
 - ◊ Installing a fabric filter would mean tearing up concrete patio slabs, whereas the low-pressure grouting process would not require tearing up patios (because the grout can be injected through core drills in the concrete slab); and
 - ◊ This method could not be used as a cost-effective "prototype" because of the costly concrete demolition that would be required at other units.
- Sand and brick have been used to cover several cracking patios. While this approach may cosmetically cover the cracks and temporarily fill in sunken areas, it does not address the real problem of soil eroding out through the sea wall joints and the resulting loss of soil compaction which could impact the structural integrity of the building foundation.
 - Pursuant to Keith Tucker's recommendation, HMA submitted a proposed "6-foot filter" repair plan to the City of Huntington Beach for approval. **HMA's repair plan was rejected by the City Building Department.** A key deficiency was the fact that a "six-foot filter" would not stop the soil erosion through the sea wall joints because HMA's sea wall is more than six feet tall.
 - Given that neither sand and bricks nor a "6-foot filter" were satisfactory repair methods to the City, HMA had no reasonable alternative but to use low pressure grouting to seal the sea wall joints, **as recommended by the Sea Wall/Patio Committee a year prior.** In late 1996, HMA submitted a revised repair plan, consisting of grouting the sea wall joints, to the City of Huntington Beach for approval. However, **HMA's repair plan was again rejected by the City, pending correction of a number of deficiencies.** The most significant deficiency was that HMA had failed to satisfactorily address soil compaction requirements.

I asked the owner of 16088 why she filed a lawsuit. She said,

"Taking legal action was the last thing in the world I wanted to do. I tried every other possible alternative to get HMA to make the proper repairs to the sea wall and my sinking patio, but they wouldn't. Unfortunately, my patience, and my time under statutes of limitations, ran out. In February 1997, after not having a waterfront patio for nearly a year, with no assurance that HMA would ever make proper repairs, and facing statutes of limitations, I had no choice but to resort to a lawsuit. Had HMA followed the recommendations of the Sea Wall/Patio Committee, there would have been no need for legal action."

HMA Accepts Judge's Proposed Settlement Terms

After failing in its attempts to have the case thrown out of court, on December 17, 1997, HMA agreed to the Court's settlement terms.

During the settlement conference, which Kathy and I attended, the judge listened to both parties' attorneys. After hearing both sides, *the judge* proposed a settlement. Both parties accepted the judge's settlement offer. I was privy to some of the settlement discussions, until the point where HMA insisted that the final terms of the settlement be kept confidential.

In pursuing legal remedy, plaintiff also sought repairs to other cracking/sinking patios and breezeways throughout our complex. Specifically, plaintiff requested that HMA be ordered to hire a qualified engineer to inspect HMA's entire sea wall and make repairs to the sea wall and other cracking/sinking patios and breezeways in accordance with the engineer's recommendations. The judge said he could not *order* the defendant to address other units in the complex via the immediate lawsuit.

However, based on the repairs HMA made subsequent to the settlement, it appears the owner got everything the Sea Wall/Patio Committee and sea wall experts had recommended to HMA, plus foundation repairs. According to a public disclosure statement, HMA also had to pay compensatory damages to plaintiff, although the amount was not disclosed.

HMA Insists on Confidentiality

At HMA's insistence, the terms of the settlement agreement are to be kept confidential. During subsequent HMA Board meetings, the owner of 16088 offered to reveal the terms of the agreement, with HMA's permission. (*The confidentiality provision can be waived by mutual consent of both parties.*) HMA President Ben Whitehead said absolutely not.

I do not know why the other Board members insist on keeping the settlement confidential. I believe homeowners should know that according to the experts:

- **HMA has a sea wall/erosion problem.** Soil is eroding out through certain sea wall joints, each time the tide goes in and out, causing waterfront patios, breezeways and planter boxes to show signs of distress, e.g., cracking and sinking.
- Covering patios with sand and brick, re-building/re-caulking and re-painting planter boxes, caulking cracks in patios with epoxy, re-routing rain gutter drains, putting white pots in planter boxes, and installing "monitoring" devices will *not* solve the soil erosion problem caused by the tidal action. Rather, many of these items are cosmetic and merely hide the problem.
- To the extent soil continues to erode through the sea wall joints, the building structure itself may be put in jeopardy due to the associated loss of soil compaction.
- **HMA is responsible for properly maintaining the sea wall.**
- **The longer HMA waits to fix the sea wall interlocks and cracking/sinking patios and breezeways, the more costly the repairs will be.**

Repairs Made to Sea Wall and Patios Follow Recommendations of Plaintiff's Structural/Sea Wall Engineer as Opposed to HMA's Soils Engineer; Repairs Reveal Settlement Terms and Magnitude of Problem

Even though HMA chose not to use a structural engineer, the owner of 16088 hired a structural engineer with 30+ years of experience in designing/constructing/maintaining sea walls. In fact, plaintiff's engineer designed many of the sea walls in Huntington Harbor. The repairs followed the recommendations of plaintiff's engineer, as opposed to HMA's soils engineer. The repairs were consistent with the plans ultimately submitted to the City for approval, as a result of the settlement, which I reviewed at the City.

Repairs began on March 23, 1998 and were completed on May 16, 1998, more than two years after the patio was demolished by HMA. I observed that all of the following repairs, with the exception welding/painting the waterfront railing, were performed by qualified, licensed contractors.

First, the cracking and sinking concrete patio slab at 16080 (the unit adjacent to 16088) was removed, as was the concrete breezeway slab in between 16080 and 16088. **There was a large void in the soil along the sea wall, similar to the void at 16088.**

Next, a licensed, sea wall grouting contractor installed 15-foot deep grouting pipes at every sea wall joint in front of 16080, 16088 and 16092. Sealing of the sea wall joints at both units adjacent to 16088 was

required in order to prevent further loss of soil at 16088.

As the contractor installed the pipes, he pointed out several large cavities in the soil along the sea wall, 3-5 feet below the surface. He referred to this as "bridging" of the soil and explained that the size of the surface void is not a reliable indicator of the magnitude of the erosion problem because there can be large voids underneath. He also explained that the waterfront patios crack because of a loss of soil and associated reductions in soil compaction. **The contractor pumped a cement slurry (fly ash) mixture through each of the 15-foot deep pipes until all the voids and joints were filled the entire height of the sea wall.** The grouting is permeable to water but prevents soil loss through the sea wall interlocks. The adjacent photograph shows the sea wall grouting procedure in progress:



Next, the contractor installed 15-foot deep grout pipes along the building foundation of 16088. A cement slurry mixture was pumped through each of the five pipes in order to fill any voids in the soil beneath the foundation and to ensure structural integrity of the building.

As the grouting contractor explained, the amount of grouting used corresponds to the size of the voids in the soil beneath the surface (**it does not include the erosion and large voids that were visible from the surface, as more than a dump truck full of soil was required to fill and re-compact these voids.**) As revealed in the contractor's final report to HMA, extremely large grout quantities were required, confirming there were large voids in the soil beneath the cement slabs. The report also refers to "large voids" in the soil.

Specifically, a total of 173 cubic feet of grout was required to fill the voids in the soil along the sea wall at 16080, 16088 and 16092. This means there were voids the size of approximately 8 large refrigerators, not including the dump truck of soil that was required to replace and re-compact the eroded soil and surface voids! While the number of sea wall joints varies across units, the sea wall repairs at 16080 required 53 cubic feet of grout, or an average of approximately 7 cubic feet per joint (significantly above the contractor's normal experience of 3 cubic feet per joint on average). Sea wall repairs at 16088 required a total of 62 cubic feet, or an average of approximately 9 cubic feet per joint. At 16092, a total of 58 cubic feet of grout was required, or an average of approximately 10 cubic feet per joint.

Ironically, the patio at 16092 had the largest voids, on average, at each sea wall joint. It is ironic because the patio at 16092 showed virtually no signs of distress because a previous owner had replaced the patio with rebar-reinforced cement and covered the patio with brick.

The soil at 16080, 16088 and the breezeway in between was re-compacted to 90% (in accordance with building codes). New patio slabs and a new breezeway slab were installed at 16080 and 16088 by a licensed contractor. The 4" slabs were reinforced with steel rebar, and they are sloped to drain properly. Lastly, the planter boxes, fences, gate and plants were restored.



Sea Wall/Erosion Problem is Affecting Other Units in Complex

The sea wall/erosion problem is not limited to the three sections of the sea wall and the three patios that have been repaired thus far as a result of the lawsuit. A report prepared by plaintiff's structural engineer and sea wall expert (who, again, designed many of the sea walls in Huntington Harbor) states:

*"My initial inspection and report were intended to be limited to your property (16088), but when I inspected the water side of the sea wall, I observed that the entire length of the wall, which we saw, appeared to have the same characteristics with respect to cracks, open joints and mudline elevation. Also, many of the patios have significant cracks which indicate movement of the concrete slabs; probably caused by loss of soil through the sea wall joints. It is my opinion that the distress to your property (16088) is caused by loss of soil through joints in the sea wall and, although I didn't inspect all of the patios, there are enough indications of distress to recommend that **all the patios** should be inspected. If the appearance of the sea wall is more or less uniform and your (16088) settlement was caused by loss of soil through the sea wall, then it is reasonable to expect that all of the properties along the sea wall are vulnerable. I recommend that an inspection and a report on the condition of the entire development be prepared to evaluate the conditions present with recommendations for repairs and a time schedule for them."*

Photographs taken by plaintiff's structural/sea wall engineer confirm **soil is eroding out through sea wall joints at multiple locations throughout the complex.**

"Monitoring Program" and Other HMA Measures are Costly and Do Not Solve Problem

HMA undertook the following measures which did not address the real problem (i.e., soil loss through the sea wall joints caused by the tidal action):

- HMA spent time and money hiring Pearsall Engineering Company to install **monitoring devices** on the sea wall and buildings, as well as devices to measure the water level behind the sea wall. Unfortunately, **the monitoring devices do not measure the amount of soil loss through the sea wall joints**. Furthermore, in granting the permit for repairs at 16088 and the two adjacent units, the City indicated that HMA must monitor the devices every six months. However, ever since the lawsuit was settled, HMA has discussed discontinuing or reducing the frequency of the monitoring.
- HMA spent time and money **re-routing all the rain gutter drains**, asserting that rain water coming off the roofs was draining into the planter boxes which, in turn, was causing the soil erosion and cracking/sinking patio problem. After inspecting the roofs myself, I discovered that most of the units have ledges on the roofs (or the roofs are slanted), and rain water was NOT draining into the planter boxes. Most of the rain gutters in question only collected rain from the *upstairs balconies*, which is minimal. Furthermore, less than half of the rain gutters drained into the planter boxes. Most of the rain gutters drained into the breezeway, and HMA merely moved the drain spout closer to the harbor. However, this past winter, the water still drained backwards in many breezeways.
- HMA spent time and money **re-building/repairing/re-painting damaged planter boxes and covered several patios with sand and brick.**
- While HMA refers to 16088 as a "prototype", **HMA has not developed a plan/schedule for other units within the complex that are experiencing the same problem.**

During a recent HMA Board meeting, Ben Whitehead reported that HMA had spent an estimated \$60,000 to date on the cracking/sinking patio problem at 16088, and that not all the bills were in yet. This includes costs associated with consultants, soil testing, monitoring devices, multiple repair plans and permit fees, etc. A relatively small portion was spent on actual repairs. The \$60,000 cost cited by Ben Whitehead does not include the recent \$15,000 increase in HMA's insurance premium, which I believe resulted in part from the lawsuit, nor does it include the costs of the items listed above.

Based on bids obtained by the Sea Wall/Patio Committee in 1995, HMA could have completed necessary repairs, and avoided the lawsuit, for approximately \$4,000 a patio.

Deferred Maintenance of Sea Wall and Lack of Sea Wall Reserves May Result in Future Assessments and/or Additional Lawsuits

HMA has never established sea wall reserves with which to maintain the sea wall. Current owners will bear the costs of HMA's deferred maintenance. Other waterfront complexes have thousands of dollars in reserves for sea wall repairs/replacement, while **HMA's reserve account, as of September 1998, is less than \$80,000 (under \$870/unit), no portion of which is designated for the sea wall.**

Important Lessons

Lessons can be learned from the lawsuit, including but not limited to the following:

- **Individual homeowners have legal standing** to bring suit against HMA and/or individual directors for negligence, failure to conduct appropriate maintenance and repairs, breach of fiduciary responsibility and other causes of action.
- **Sellers are obligated to disclose problems.** If they do not, they may be found liable.
- **Litigation is far more costly than addressing problems right the first time.** Had HMA followed the free recommendations of its own sea wall/patio committee and outside sea wall experts two years ago, there would not have been a lawsuit. For the amount of money spent to date, it is likely that HMA could have repaired all faulty joints in the sea wall, as well as the cracking/sinking waterfront patios throughout the complex (without any assessment or increase in dues). **Furthermore,** HMA's insurance carrier may not have raised HMA's liability insurance premium.
 - ⇒ HMA should establish a grievance committee.
 - ⇒ HMA should establish an alternative dispute resolution process.
- HMA should hire a structural engineer/sea wall expert to inspect the entire sea wall and make recommendations.
- **Based on the engineer's recommendations, HMA should establish a plan** and schedule for repairing other waterfront patios and other sections of the sea wall that are in need of repair
- **HMA should establish adequate sea wall reserves.**

The RESIDENT'S NEWSLETTER is published by HMA Director Al Valencia 16100 Mariner Drive Huntington Beach, CA 92649

Questions and suggestions have been submitted by concerned homeowners. Funds for the publication have been donated.

Please submit comments or suggestions in writing.