Knock, Knock, Knocking on Members' Doors

By Stephen T. Brindle, Esq.

IN EVERY COMMUNITY association, situations will inevitably arise that require the association to enter an owner's unit or onto an owner's lot. One such example is when the association needs to perform required maintenance and repair work of the common area or respond to an emergency situation.

In some instances, owners may be happy to provide the association with access to their separate interests. In other cases, however, owners may refuse to provide such access, forcing the association's board to ask themselves, "Now what?"

How can an association obtain access into an owner's separate interest desperately needed to meet its legal obligations, while at the same time staying within the limits of the law and protecting the association's employees and management personnel from potential harm?

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LEGAL BACKGROUND

Courts have characterized CC&Rs either as a contract between owners and an association, or as a set of equitable servitudes running with the land, or both. For this reason, owners in community associations, simply through the act of buying into the community, are generally understood to have consented to allowing for unit access when needed for the association to fulfill its duties, or to have waived their rights to object to same.

RIGHTS OF ENTRY

A well-drafted provision in a set of recorded CC&Rs providing an association with the express right to enter an owner's separate interest unit or lot at specific times and for specific purposes should provide that association with the legal authority it needs for entry so that the association may discharge its legal obligations. If an association's CC&Rs do not already contain such a right, the board should strongly consider adding such an amendment.

However, regardless of whether or not a set of CC&Rs contains a right of entry clause, it can be argued that because community associations have an obligation to repair and maintain the common area, they also have an *implied* right to enter owners' separate interests to discharge such obligations.

QUIET ENJOYMENT CONCERNS

Whether an association has an express or implied right of entry, it still must exercise that right so as to provide owners with sufficient notice of entry in order to reduce interference with an owner's quiet enjoyment rights (see *Ironwood Owners Assn. IX v. Solomon*[1]).

Exactly how much notice owners are entitled to is not always clear. However, if an association intends to exercise its right (express or implied) to enter an owner's separate interest, the association should at the very least provide owners with reasonable notice and an opportunity to respond prior to entering.

EMERGENCIES

An exception to the reasonable notice requirement occurs in the event of an emergency. Where community associations are concerned, an emergency is generally defined as a situation where there exists an imminent risk of injury to persons or damage to property, such that it would be impractical to require the association to provide prior notice.

For an association performing maintenance and repair work to the common area, most situations will not constitute an emergency unless there is an imminent risk of injury to persons or damage to property, such as a leak originating in a stacked unit that threatens to cause the ceiling of the unit below to collapse.

Similarly, most compliance inspections of an owner's separate interest will not constitute an emergency, but could in certain circumstances, such as where there is an infestation of vermin or mold growth that could extend beyond the owner's separate interest.

If an owner nevertheless refuses to allow entry, it is worth reminding him or her that the option of providing reasonable access will be more economical in the long run compared to the cost of litigation.

LIABILITY CONCERNS

The purpose of furnishing reasonable notice to owners is not simply to protect quiet enjoyment rights. It is also to mitigate against the very real risk that an owner could, when confronted with someone attempting to enter their separate interest, respond with force. After all, if there is any place where owners might lawfully assert the right to use such force in self-defense, it is in defending themselves against what they might reasonably perceive to be an unlawful intruder into their home.

Most well-drafted CC&Rs will attempt to negate these risks with language stating that no person entering an owner's separate interest on behalf of or at the direction of the association shall be considered guilty of a trespass.

That said, if an owner calls the police, the association and the association's managing agent could nevertheless find themselves involved in a tense standoff. In these cases, even if an association is ultimately shielded from liability based on the language in its CC&Rs, it may find itself spending significant time and money resolving the aftermath of such claims.

BEGINNING A DIALOGUE

The best starting point for any association seeking to obtain entry into an owner's separate interest is by first engaging in open dialogue with that owner in a way that makes further negotiation possible.

This dialogue may be facilitated by providing the owner with citations to the specific sections of the CC&Rs that grant the association the authority to enter the owner's separate interest upon reasonable notice (except in the event of an emergency). Extending an olive branch to owners by negotiating the specific circumstances under which the association may enter may also be helpful, such as times of day and the particular directors or association personnel who will be present.

If an owner nevertheless refuses to allow entry, it is worth reminding him or her that the option of providing reasonable access will be more economical in the long run compared to the cost of litigation. This is especially true when an association's need for access is well-founded, such as to enable the association to perform required repair and maintenance of the common area.

Some owners need to be reminded that if the association is forced to pursue litigation to obtain access into the owner's unit, and ultimately prevails (which is likely), it will petition the court thereafter for an award of its attorney's fees in obtaining such a result. Recent California cases have held that it is not necessary for an association to wait until the conclusion of a full trial to petition for an award of attorney's fees, provided that the association obtained the result it sought through litigation, such as injunctive relief ordering an owner to provide access.

SELF-HELP

Some associations may be tempted to use a locksmith to gain entry to an owner's separate interest, without first obtaining a court order. In a true emergency situation (one posing an imminent risk of injury to persons or damage to property),

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the use of a locksmith may be a reasonable exercise of a board's discretion.

However, in 2020, absent such an emergency, an association should always obtain an owner's prior consent or a court order granting it the right to enter.

When it comes to passing the cost of a locksmith back to an owner, that will depend on the circumstances. For example, if an owner has been accommodating during the entire process, but is simply unable to provide the association with the necessary access (for example, when access is requested, but the owner is away on vacation), the association may decide to absorb the cost for the locksmith.

On the other hand, where an owner has been uncooperative in the event of an emergency, a board may reasonably decide to charge the cost of the locksmith back to the owner, including via a reimbursement assessment where allowed by the CC&Rs and following a noticed hearing before the board.

INJUNCTIVE RELIEF

When an association is forced to obtain injunctive relief – such as an order mandating an owner to grant the association access – it may enforce the order accompanied by the local sheriff, who is responsible for ensuring that civil orders are fully and safely carried out.

An action for injunctive relief is determined in a bench trial (as opposed to a jury trial), and can take anywhere from a couple of days to several weeks to be decided, depending on whether an owner seeks to oppose it and whether the relief sought is an emergency.

Some boards ask why they should go to court to obtain an order to access a unit if the association's CC&Rs already provide the association with an express right of entry. The answer is simple: safety first. Even if an association already has an express right of entry in its CC&Rs, it is still strongly recommended that it first obtain such an order if an owner does not consent to entry.

For one thing, a well-drafted order will set out the parameters for the association's entry and the nature of the work being performed, and will bar the owner from interfering with such work.

Second, an owner who fails to comply with the terms of a lawful court order may be subjected to civil or even criminal penalties for contempt of court.

Third, the process of seeking and obtaining an order through litigation constitutes an "action to enforce the governing documents" that entitles an association with a right to petition the court for an award of its attorney's fees, per Civil Code § 5975(c).

BEST PRACTICES

Regardless of whether an association enters an owner's separate interest with the owner's consent, with reasonable notice or without notice where it is not practicable in the event of an emergency, pursuant to an express or implied right of entry or following the issuance of a court order, there are additional best practices that associations can use to help protect themselves from liability.

First, use a video recording device to document the condition of the separate interest and the activities of persons entering the unit. Videoing a copy of that day's newspaper can be a helpful evidentiary tool for verifying the date that entry occurred.

Second, be careful to stick to areas of the property that are the true subject of an inspection and to use caution not to enter or inspect areas that are not, such as closets, drawers, etc. Use common sense: If viewing something feels like it could be interpreted as an invasion of privacy, do not photograph or video it.

Third, there is safety in numbers. More than one person from an association or its managing agent should be present during entry, both to accurately document the property's condition and in case there is pushback from an owner.

Finally, when it comes to liability for damage that may occur during entry, the answer is going to depend on the CC&Rs. Well-drafted CC&Rs may have a provision stating that an association is not liable for any damage that results from the performance of its required obligations while present in an owner's separate interest, such as demolishing finished flooring surfaces to gain access to common area utilities. Other CC&Rs may be silent, which can lead to disputes regarding responsibility.

In either case, it is quite possible that an association will be held liable for damage or destruction that occurs to an owner's movable personal property (as opposed to fixtures) during entry; so be particularly careful to avoid this type of damage and make sure to have a witness from the association or its managing agent present. ■

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1 (1986) 178 Cal.App.3d 766