Kriger LAW FIRM

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News

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Attorney Attendance at Board Meetings

By Bradley A. Schuber, Esq.

How would you like a few extra attorneys at your board meeting to carefully watch the board conduct its business? What if each member could bring an attorney to the meeting to speak on behalf of the member? Or, what if members could just send attorneys in their place, where the attorney simply attempts to rally a few more members to his client's cause?

Well that could be a possibility if California Assembly Member Donald P. Wagner of the 68th District gets his bill passed. On January 27, 2016 he introduced Assembly Bill 1720. The Bill would enable a member to either bring an attorney with them to board meetings or to have an attorney attend board meetings in lieu of the member.

ASSEMBLY BILL 1720 WOULD ENABLE A MEMBER TO EITHER BRING AN ATTORNEY WITH THEM TO BOARD MEETINGS OR TO HAVE AN ATTORNEY ATTEND BOARD MEETINGS IN LIEU OF THE MEMBER

Currently, *California Civil Code* Section 4925 governs attendance at board meetings. It provides, in part, that any "member" may attend any board meeting, except for executive session, and that the member may speak at any board meeting, subject to a reasonable time restriction. However, Section 4925 limits attendance at meetings to members of the Association, and not their friends, relatives, accountants or their attorneys. Moreover, California case law interpreting the statute has held the statute limits attendance at board meetings to members only. See *SB Liberty, LLC v. Isla Verde Association, Inc., 217 Cal.App.4th 272 (2013).*

If amended, Section 4926 would notably alter California law, and amend Section 4926 to include the following language: "The Board shall permit an attorney who represents a member to attend any board meeting that the member is permitted to attend, regardless of whether the member attends. Where possible, the member shall give the board at least 48 hours advance written notice that his or her attorney will attend the board meeting."

While there are various problems inherent in permitting attorneys who represent members to attend board meetings, it most notably calls into question California Rule of Professional Conduct 2-100. Rule 2-100 provides, in part, as follows: "while representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

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Association Grants Exclusive Use of Common Area for Parking Spaces

INDICATION OF FUTURE COURT DETERMINATIONS

By Jamie Handrick, Esq.

In a case captioned *Pflugh v. 2-4-6-8-10 Steiner Street and 490-492-494-496 Duboce Avenue Condominium Homeowners Association, Nos. A141771 & A142827,* the court determined that unanimous owner consent was not required to convert a portion of the common area to exclusive use area. This case cannot be relied upon by attorneys in court because it is an unpublished decision but it is important to consider because it is an indication of how the California Court of Appeal may address these types of disputes in the future.

Plaintiffs own three of the 10 condominium units in the Duboce-Steiner Condominium development located in San Francisco. Two of the units face the interior of the complex. The front doors of the two units are not accessible from the street, but are only accessible from a private driveway off of a street that runs through the interior of the development.

The original CC&Rs granted each owner a percentage interest in the common area. The CC&Rs declared the common interest appurtenant to each unit to be permanent in character and that it could not be altered without the consent of all

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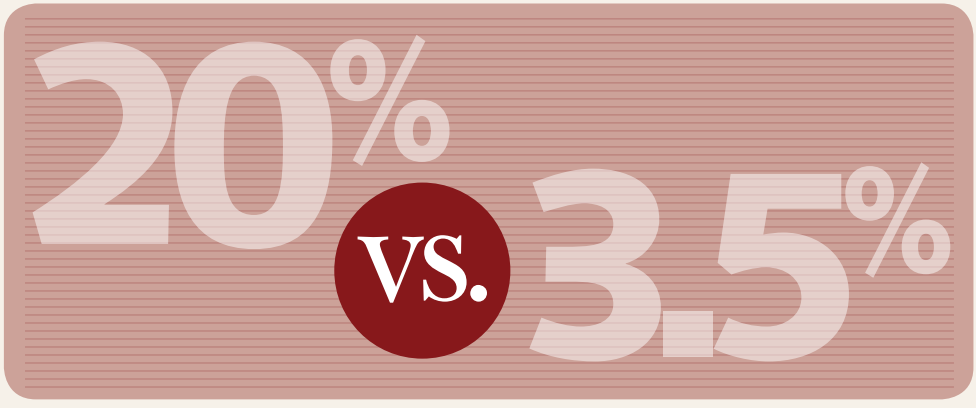
Changes in FHA Requirements Possible

THE BURDEN OF MAKING A LARGE DOWN PAYMENT IS SIGNIFICANTLY REDUCED

By Joel Kriger, Esq.

Progress has been made toward helping condominium projects recertify their Fair Housing Act (FHA) approval. H.R. 3700 which is the "Housing Opportunity through Modernization Act" passed the House and has been referred to the Senate. There are many advantages to buyers in financing a home in an FHA certified project. One of the main advantages is that the burden of making a large down payment is significantly reduced. Generally, conventional lenders will require 20% down payment but the minimum down payment required by a lender in an FHA approved project is 3.5%.

The recertification process can be onerous for associations. The financial health of the Association is examined in great detail from the condition of its reserve balances, delinquencies, annual financials, to even owner occupancy rates. The current requirement for owner occupancy is a minimum of 50%, but the proposed bill will allow that to be reduced to 35%. If the bill becomes law it will not only help condominium projects maintain their FHA approval, but will also ease the burden on condominium projects and put home ownership in reach for more families.



Recertification in condominium projects has not been required until recently. In the past, once the project was certified it kept that status indefinitely. Generally the developer handled that process and there was no need for any further action on the part of the Association to maintain the availability of FHA financing. Now condominium projects must be recertified every two years. The standards are strict and projects that don't meet the minimum requirements because of delinquencies, financial health or sufficient reserves will be denied.

This bill is a step in the right direction and hopefully will allow more projects to obtain their recertification allowing greater access to home ownership for all. ■

"Zombie Properties" Affect Association Aesthetics and Finances

ASSOCIATIONS SHOULD PROACTIVELY ASSERT THEIR RIGHTS AGAINST OWNERS WHO ABANDON PROPERTIES

By Garrett Wait, Esq.

Since the beginning of the financial crisis in 2008, some lenders have often allowed delinquent properties to remain in default for many months or even years before foreclosing. Owners often would abandon the property as they were under the assumption that their bank would take the property back quickly. Of course, that left the property standing uninhabited, unmaintained, and almost always accruing delinquent homeowners assessments. The banks' malaise and the owners' haste to let the property go often left homeowners associations searching for answers.

Homeowners associations do have some measure of recourse against these so-called "zombie properties" if they act thoughtfully and quickly. First, if an association is concerned that a property has been abandoned, the board likely has a duty to inspect the condition of the home to ascertain whether or not the owners are remaining at the property. If the board determines that the property is abandoned and going unmaintained, the association may be able to file a complaint against the lender with the Consumer Financial Protection Board. The lender could be subject to fines for failure to foreclose on the property and allowing it to become blighted.

Additionally, if there is an assessment delinquency, the owner on title will be personally liable for the debt to the homeowners association. Even after the bank forecloses, the assessment delinquency will remain viable for up to four years from the last date the owner was on title. Associations should proactively assert their rights against owners who abandon properties and fail to pay their assessment obligations.

Banks and owners who take actions that leave homeowners associations with abandoned properties and delinquent accounts need to be held accountable. Associations are not completely powerless in this regard but should discuss their options with legal counsel in order to determine the best course of action with regard to these "zombie properties." ■

Going Green

BEST PRACTICES FOR PAPERLESS RECORDS STORAGE

By Elizabeth Call, Esq.

We often field "going green" questions from our clients. These questions span topics such as landscaping, water conservation, drought, and recycling. Associations can also lessen environmental impact by "going paperless." *California Corporations Code* authorizes records to be held in paperless form:

"Minutes and other books and records shall be kept...in any other form capable of being converted into clearly legible tangible form... When minutes and other books and records are kept in a form capable of being converted into clearly legible paper form... [they] shall be... accepted... to the same extent as an original paper record." *(Corp. Code §8320(b)).*

Meeting minutes should be signed, scanned and then saved to a hard drive or the cloud as executed documents. Saving the document in a word processing program is not sufficient because it does not capture the signature and also leaves the document susceptible to manipulation. Each document should be scanned and reviewed for accuracy before disposing of the originals.

Managers should advise clients in writing of the proposed paperless practice prior to shredding and recycling original records. Some Boards may elect to store original documents onsite in addition to

scanning. We recommend at least a double computer backup system for storing electronic records. For example, records may be saved to a computer or server, a cloud, and a third independent backup system to ensure recovery in the event of catastrophe. One common type of cyber-attack is when a third party remotely seizes a computer's storage and holds that data "hostage" in exchange for money. If properly backed up, a cyber-attack is less of a threat.

Scanning all minutes allows for easy upload to a website and sharing. If an owner makes a request for meeting minutes, the Association should first redact any confidential information. Computer programs such as Adobe Acrobat enable easy redacting without needing to print the document. The redacted documents can then be emailed or mailed to the owner.

Lastly, owners may elect to receive general notices via electronic means so long as certain criteria are met *(Civ. Code §4040(a); Corp. Code §20)*. Electronic notices benefit the environment but require increased technological capabilities. Archiving records and sending electronic notices are best approached with tact. Counsel can assist with creating a step-by-step protocol that is compliant with California law and helps the Association operate more efficiently. ■

PARKING SPACES — EXCLUSIVE USE

CONTINUED FROM PAGE 1

owners affected and the first mortgages of such owners as expressed in an amended declaration.

In 2007, owners of unit 12 advertised their unit for rent, indicating that it included two parking spaces. Pflugh argued that the CC&Rs did not allow parking in what was deemed the "Steiner Area." Pflugh threatened to sue the Association if it allowed units 10 or 12 to park in the Steiner Area. In 2008, the Association sent a letter to all owners notifying them that parking in this area was not allowed.

In December 2009, the owners of units 10 and 12 entered into a license agreement with the association that allowed them to park in the Steiner Area. Each owner had to pay $1,500 per year to park there with the Association's consent. In 2011 the CC&Rs were amended to designate the Steiner Area as exclusive use common area with units 10 and 12 each being assigned one parking space. The owners of units 10 and 12 agreed to pay $4,000 each for the parking spaces.

In July 2013 Pflugh sued claiming the Association and the owners of units 10 and 12, claiming they breached the original CC&Rs by allowing exclusive use of common area without a unanimous vote of the owners. The court was provided evidence that the Steiner Area had long been used for parking by the occupants of units 10 and 12, even though the CC&Rs did not specifically designate this area for parking. The court also considered that the front doors of units 10 and 12 open into the Steiner Area, and that people seeking to access the units must enter through the driveway's gate. These two units were the only units in the community that had front doors opening directly into the common area. The court determined that Plaintiffs failed to show the original CC&Rs applied to the Association's vote to grant an exclusive use common area for parking for units 10 and 12, thus allowing for a grant of exclusive use common area without a vote of all owners in the Association. ■

ATTORNEY ATTENDANCE

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In light of Rule 2-100, it seems problematic for an attorney representing a member to attend a board meeting. First, even if requested, counsel for the Association is unlikely to provide consent to the member's attorney. Second, the moment the attorney attempts to communicate directly with the board or perhaps indirectly by speaking to other members in front of the board, the attorney would likely be subject to discipline.

In the event Assembly Bill 1720 is passed, associations may want to consider adding some text to the bottom of each meeting agenda such as "Please Take Notice that this Association is represented by Counsel." This should provide attorneys representing members with advanced written notice that the Association has representation. Even without passage of Assembly Bill 1720, if a board holds a meeting where an attorney representing a member is in attendance, then the board should ask the attorney to leave. In the event that the attorney refuses to leave the meeting then the Board is within its right to adjourn the meeting in order to seek advice of counsel. ■

ATTORNEY-CLIENT PRIVILEGE BENEFITS ASSOCIATION, NOT MEMBERS

By Garrett Wait, Esq.

A privileged communication is any communication from an attorney to the board of directors or managing agent for an Association. From time to time, members of an Association attempt to request privileged documents during a dispute with the board of directors. They often claim that as members of the Association, they are entitled to review privileged communications because they believe that the Association's attorney also acts as their attorney. This is not the case. In a widely cited opinion, *Smith v. Laguna Sur Villas Community Association,* the court roundly rejected the idea that members were included in the attorney-client privilege arrangement, stating that "[i]t is no secret that crowds cannot keep them."

An Association is its own legal entity with many or all of the same rights and privileges any other legal entity would have, including the right to be represented by an attorney. Though the attorney-client

privilege is reserved for the board of directors and the Association's managing agent, it is not an absolute privilege and can be lost in a number of ways. Directors must be careful when discussing matters with non-director members of the Association, particularly when talking to a member who is adverse to the Association in a dispute. Further, allowing members to participate in executive session rather than excluding them when the board is speaking to its attorney is a way to lose the privilege.

Unintentional waiver of the attorney-client privilege opens up the Association to potential discovery motions for privileged communications in litigation. That could frustrate the Association's attorney's ability to develop case strategy and freely discuss legal options with the board of directors. Directors should always keep the attorney-client privilege in mind when discussing potentially sensitive issues with non-directors. More to the point, directors should not speak about those issues outside of executive session in order to preserve the privilege. ■

Kriger LAW FIRM NEWS

Managing Editor
Joel M. Kriger, Esq.

Corporate Office
8220 University Avenue, Suite 100
La Mesa, CA 91942-3837
(619) 589-8800 · FAX (619) 589-2680

Servicing San Diego, Riverside,
San Bernardino and Los Angeles Counties

krigerlawfirm.com

email: hoalaw@krigerlawfirm.com

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