Kriger LAW FIRM News
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New Legislation Affecting Common Interest Developments in 2018


By Joel Kriger, Esq. & Bradley A. Schuber, Esq.

The California State Legislature proposed several bills in 2017. Most notably, the Legislature restricted associations from infringing on members' rights to free speech, made it easier for members to install solar energy systems on common area roofs, and set forth additional disclosure requirements for property managers who manage common interest developments. These bills along with several others that became law this year will place additional responsibility on associations and property managers in 2018.

NEW DISCLOSURES FOR MANAGERS

Changes to Civil Code section 5375 and the addition of Civil Code section 5375.5 have increased the disclosures required to be made by managers to the Associations they serve. Existing law requires that a manager provide a written statement to the board at least 90 days before entering into a management agreement informing them of the owners or general partners of the management company. If any of the owners of the management company hold any relevant licenses such as architectural design, construction, engineering, real estate or accounting, the specifics regarding the individual who holds the license must be disclosed. Any relevant professional certifications or designations held by any of the owners must also be provided.

In addition to these requirements, the new legislation will require the management company to disclose any business or company in which it has any ownership interest, profit-sharing arrangements, or other monetary incentives provided to the management company. The manager must disclose whether the firm receives a referral fee or other monetary benefit from a third-party provider who distributes documents with regard to escrow upon sale of a unit.

Finally, the manager must disclose, in writing, any potential conflict of interest when presenting a contract proposal to an Association. Conflict of interest for purposes of this law means any referral fee that could be derived from a company providing products or services to the Association and any ownership interest or profit-sharing arrangements with service providers recommended to, or used by, the Association.

USE OF OWNER'S LAST KNOWN ADDRESS

Owners are required to provide basic information to their Association each year. This includes an address for delivery of notices, name and address of the owner's legal representatives, if any, whether the unit is owner occupied, rented out, or vacant. The Association is permitted to use the last address provided in writing by the owner for notices.

The proper address for notice to an owner often becomes an issue when they are delinquent in assessments or need to be notified of violations. It is not uncommon for an off-site owner to fail to update their address resulting in notices sent to their last known address being returned. The law requires that notice be provided to owners before action can be taken to collect the unpaid assessments or impose monetary penalties for violations.

Civil Code section 4041 addresses these requirements and has been amended to provide that in the event the owner does not provide any address that the property address is deemed to be the address to which notices are to be delivered. This amendment will allow law firms serving associations and associations themselves to fulfill the legal requirements of providing notice to owners regarding delinquent assessments and/or violations when that owner has failed to provide them a current address.

NON-COMMERCIAL SPEECH

The California State Legislature has increased members rights to peacefully assemble and communicate with one another with the enactment of new Civil Code Section 4515. Under the new law, governing documents for a common interest development may not prohibit a member from peacefully assembling with other members, residents and their guests for purposes of "common interest development living, association elections, legislation, election to public office, or the initiative, referendum or recall process."

In addition, a member may invite public officials, candidates for public offices, or representatives of homeowner organizations to meet with other members, residents and guests to speak on matters of public interest. In doing so, members may use the common area, clubhouse, or a member's separate interest for such peaceful assembly. Members may also canvass and petition other members and residents for such purposes. Finally, members may distribute or circulate information regarding the above topics or "other issues of concern" to other members and residents without prior permission of an association. All of the non-commercial speech activities provided for under the new law must be done during reasonable hours and in a reasonable manner.

Section 4515 further provides that an association may not require a fee or deposit, or liability insurance from a member or resident, or require the payment of a premium or deductible on an association's insurance policy in order for a member or resident to use the common area for non-commercial speech activities. Lastly, a member or resident who is prevented by an association or its agents from engaging in any of the activities listed in the statute may bring a civil or small claims court action to enjoin enforcement of governing documents. The statute also authorizes a court to assess a civil penalty of not more than five hundred dollars for each violation.

SOLAR ENERGY SYSTEMS

Assembly Bill 634 significantly increases a member's right to install solar panels on

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In This Issue:

Rental Restrictions in CC&Rs Found Reasonable by Appellate Court

By Jamie Handrick, Esq.

Earlier this year, in an unpublished case (i.e., cannot be relied on as legal authority in future lawsuits) called Ocean Windows Owners Association ("Association") v. Anna Spataro ("Spataro"), the California Court of Appeal upheld the Trial Court's ruling awarding the Association's petition to reduce the percentage of affirmative votes required to amend its CC&Rs.

Ocean Windows Owners Association is a common interest development located in Del Mar and consists of 45 condominium units. The Association amended its CC&Rs and sent the amendment to the members for a vote.

The Association did not meet the 75% approval requirement to amend. Therefore, the Association petitioned the court as allowed by Civil Code Section 4275 to request the judge approve the amendment because more than 50% of the members approved the amendment.

The Association provided testimony about the problems caused by short-term renters, such as, parking, damage to the common area (elevator, lobby doors, and hallways), noise issues from unknown drunken people wandering the property

Anna Spataro challenged the Association's petition because the amendment contained the following provision:

> *"Units may not be rented for transient purposes. All rentals must be for a term of no fewer than thirty (30) consecutive days in any one (1) calendar year, except month-to-month tenancy created by law or except an Owner who is a lender in possession of a Condominium following (i) a default in the first mortgage, (ii) a foreclosure proceeding or (iii) any deed or other arrangement in lieu of foreclosure. All rentals must be for the entire Unit, and not for any partial portion of such Unit."*

Spataro used her unit as a short-term rental. She told the court that the above-referenced language was "unnecessary" and a "power grab" by the Association and should not be allowed. The Appellate court disagreed. The Association provided testimony about the problems caused by short-term renters, such as, parking, damage to the common area (elevator, lobby doors, and hallways), noise issues from unknown drunken people wandering the property, owners finding it difficult to obtain financing for their units because lenders perceived the Association to be a "condotel" because of short term vacation rentals.

The standard for the court to follow when determining whether to grant a petition pursuant to Civil Code 4275 is whether the amendment is "reasonable", not whether the amendment is "necessary". The term "reasonable" means not arbitrary or capricious, rationally related to the protection, preservation and proper operation of the property for purposes of the Association as set forth in its governing documents and fair and nondiscriminatory.

Spataro was one of 3 owners in the community that objected to the amendment. The Appellate court found the short term rental restriction was reasonable. The court granted the Association's petition to amend its CC&Rs. ■

There are some pretty scary things going on at Kriger!!!

Tourists, Trekkies, Ducks, Tool Mavens, Hot Air Balloons, Lederhosen-wearing Zombies, and Motocross Racers!

Kriger Law firm is very diverse! Happy Halloween!

Jackie Finn, Steve Banks, Erma Sparrow, Julie Luci, Christina Rice, Andre Mejia, Kneeling – Jamie Handrick

Challenging Membership List Requests by Groups and Individuals

By Steve Banks, Esq.

Association members have a right to inspect and copy the membership list of names and addresses that the Association is required by law to maintain. When can an HOA deny a member's request for inspection of its membership list? Does it matter if the request comes from an individual or a group? What if both proper and improper purposes might underlie the request?

Under Corporations Code provisions, a member's inspection must be for purposes reasonably related to their membership interests. The HOA has the burden of proving by substantial evidence that the member will use the information for an improper purpose. *(WorldMark v. Wyndham Resort Development Corp.* (2010) 187 Cal.App.4th 1017, 1029.)

Mere speculation that the member will use the information for an improper purpose is insufficient to justify denial of inspection; any suspicion must be based on adequate facts. (*Gilmore v. Emsco Derrick & Equipment Co.* (1937) 22 Cal.App.2d 64, 67.)

It is also important to determine whether the request is coming from an individual or a group, as improper group requests require judicial intervention. Under the Corporations Code, different procedures apply depending on whether the records request is made by a single member or by an "authorized number of members" (typically, with certain exceptions, five percent of the voting power – see Corporations Code 5036). If the request is being made by an "authorized number of members", the Association *must seek a court order* setting aside the demand. If it fails to do so and the requesting party seeks judicial review to compel compliance with the demand, at the hearing no inquiry may be made into the use for which the list was sought. However, if the request is made by an individual member, the Association has the right to claim the request is being made for an improper purpose without seeking a court order. (See, *Tract No. 7260 Assn., Inc. v. Parker* (2017) 10 Cal.App.5th 24.)

In Tract No. 7260 *Assn., Inc. v. Parker,* a former HOA board member sued the HOA to compel inspection after it largely denied his request because it believed he was aligned with others separately suing the HOA and was seeking to use the membership list and other records against the HOA in that lawsuit, which was filed on the same day he made his records request. The trial court denied his request for books and records, agreeing with the HOA that he sought inspection for an improper purpose unrelated to his membership interest. However, the trial court ordered the membership list disclosed because the HOA had failed to timely challenge the membership list request in court. Both parties appealed.

Under Corporations Code provisions, a member's inspection must be for purposes reasonably related to their membership interests.

The appellate court concluded that substantial evidence supported the trial court's finding that the information was sought for an improper purpose. The fact the requesting member might also assert a proper purpose related to his interests as a homeowner was insufficient to defeat this finding of improper purpose. The appellate court also found the HOA's challenge to the membership list request was not barred by statute, since the request was made as an individual member, rather than by an authorized number of members, and therefore no court intervention was required for the HOA to deny the request as being made for an improper purpose.

In summary, an association considering denial of a member records request should determine whether adequate facts exist to support a claim that the request is being made for an improper purpose. If the request is being made by an authorized number of members rather than an individual member, the association must be prepared to go to court to have the records request set aside. Kriger Law Firm routinely assists associations in handling matters of this nature. ■

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NEW LEGISLATION AFFECTING COMMON INTEREST DEVELOPMENTS IN 2018

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common area roofs in common interest developments. Among other things, it amends Civil Code Section 714.1 so that an association may not prohibit the installation of a solar energy system on the common area roof of the building in which the owner resides, or on an exclusive use garage or carport adjacent to the unit.

It also amends Civil Code Section 4600 regarding the voting requirements pertaining to the grant of exclusive use of the common area to a member. Section 4600 generally requires an affirmative vote of the members owning at least 67 percent of the separate interest in the common area before an association can grant exclusive use of any portion of the common area to a member, unless it falls within a specific exception. Previously there was no exception for solar energy systems; however, the amendment now creates a new exception so that no membership vote is required "to install and use a solar energy system on the common area roof of a residence."

Lastly, AB 634 adds new Civil Code Section 4746 pertaining to installation of a solar energy system on multifamily common area roofs. The statute contains some mandatory requirements. So when reviewing a request to install a solar energy system, an association must require an applicant to notify each owner in the building on which the installation will be located. An association must also require the owner and each successive owner to maintain a homeowner liability coverage policy and to provide the association with a certificate insurance within 14 days of approval and annually thereafter. However, the statute also sets forth certain optional requirements for associations. So an association may require an applicant to submit a solar site survey prepared by a licensed contractor showing the placement of the solar energy system to determine usable solar roof area, and equitable allocation of usable solar roof area among all owners sharing the same roof, garage or carport. An association may also require the owner and each successive owner to be responsible for damage to physical building components resulting from the solar energy system. Finally, an association may require owners to disclose the existence of any solar energy system and related responsibilities to potential buyers.

INCREASED RECORDING FEES

Beginning on January 1, 2018 associations will incur additional fees when recording documents with the county recorder's office. The Legislature has amended Government Code Section 27388.1.(a)(1) to impose a fee of seventy-five dollars ($75) when recording various real estate documents. These documents include, but are not limited to, grant deeds, deeds of trust, quit claim deeds, requests for notice of default, abstracts of judgment, notices of default, notices of trustee sale, mechanic's liens, maps, and covenants, conditions, and restrictions.

Under the statute, the new recording fees are charged per single transaction and per parcel of real property, and the total fee imposed by the new law is not to exceed two hundred twenty-five dollars ($225) per parcel. As these fees are collected, each county recorder is required to remit the fees collected on a quarterly basis. The county recorder may deduct any actual and necessary administrative costs incurred by the county recorder in carrying out the law. However, if a county recorder fails to timely remit fees, then under the new law the county recorder is required to pay the Controller interest at the legal rate.

While the purpose of the new legislation is to provide financial assistance for such things as emergency housing, home ownership opportunity for low-income households, and down payment assistance for first-time home buyers; the cost of the legislation will be passed along, in part, to associations and its members. An unfortunate result of the new legislation is that many times these fees will be borne by members who have fallen behind and the subject of collection activities, making it even harder for them to become current with their assessments. ■