Second Quarter · 2019

Kriger LAW FIRM News

Membership Must Approve Exclusive Use of Common Area

By Joel Kriger, Esq.

It seems like such a simple matter. One owner applies to the Board to replace his window with a sliding glass door. Board approves; sliding glass door installed. Neighbor sues, court holds 67% of the membership was required to approve the new sliding glass door. Why? The section of exterior wall removed is common area. Since the owner was making exclusive use of the removed portion of the exterior perimeter wall it was considered granting exclusive use of common area which, as a general rule, is not permitted without a membership vote. How did this come about?

Civil Code section 4600 authorizes the board of directors of an association the ability to grant any member exclusive use of a portion of the common area but only with 67% membership approval. There are several exceptions which include (1) granting the member exclusive use of an area that is generally inaccessible and not of general use to other members, (2) to accommodate a disability, (3) installation of an electric vehicle charging station, and (4) installation of a solar energy system on a common area roof. As to these exceptions, the board may grant such a request without membership approval.

Recently in the case of *Richardson v. Huntington Pacific Beach House Condominium Association,* a member made an application to convert a window into a sliding glass door. His neighbor unhappy with the modification sued claiming that the approval to install the sliding glass door constituted a grant of exclusive use of a portion of the common area, i.e., the portion of the exterior wall removed and replaced with the sliding glass door. The court ruled in favor the neighbor holding that 67% of the membership had to approve the new sliding glass door.

Under the trial court's interpretation of section 4600, any Association's approval to modify the perimeter walls and roofs would likely require a membership vote (or the Association would risk being sued). For example, if the architectural application enlarged any window or door opening in the perimeter walls, added a skylight, or did anything which even slightly reduced, changed, or rearranged the square footage of the perimeter walls and roofs.

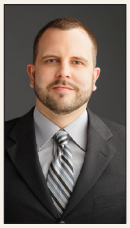
The trial court's trouble with the Association's approval of the homeowner architectural improvement application was a concern that any reduction, however slight of the square footage of the perimeter walls enclosing an individual unit defined as "common area," triggered the supermajority homeowner vote requirement under section 4600.

This is a trial court decision and is not legal precedent. The matter is currently on appeal and when its decision is rendered will become a legal precedent and provide guidance to associations on how issues of this nature should be handled.

It is our opinion that the trial court's interpretation of Civil Code section 4600 is over technical, not what the legislature intended and also impractical. A board or architectural committee should have the authority to grant a member's request to modify a window, install a skylight or other minor change to the exterior of the building without membership approval. The statute's purpose is to prevent the board from giving away common area ground that is used and enjoyed by other members. It is our opinion that this statute was never intended to apply to an exterior building wall space or even a section of the roof where a skylight could be installed. We will keep you posted on the final outcome of this issue in future newsletters. ■

In This Issue:

Associations Must Always Provide Due Process Before Imposing Discipline



By Tyler Kerns, Esq.

Sometimes, it is apparent a violation of an association's governing documents has occurred. In such instances, it might seem unnecessary to invite the responsible owner to a hearing before imposing a fine for the violation. Boards of directors may be tempted to go ahead and impose a fine and then have a letter sent to the responsible owner notifying the owner that a fine has been imposed as a result of the violation. However, such a fine would be invalid if the owner was not provided due process prior to the imposition of the fine.

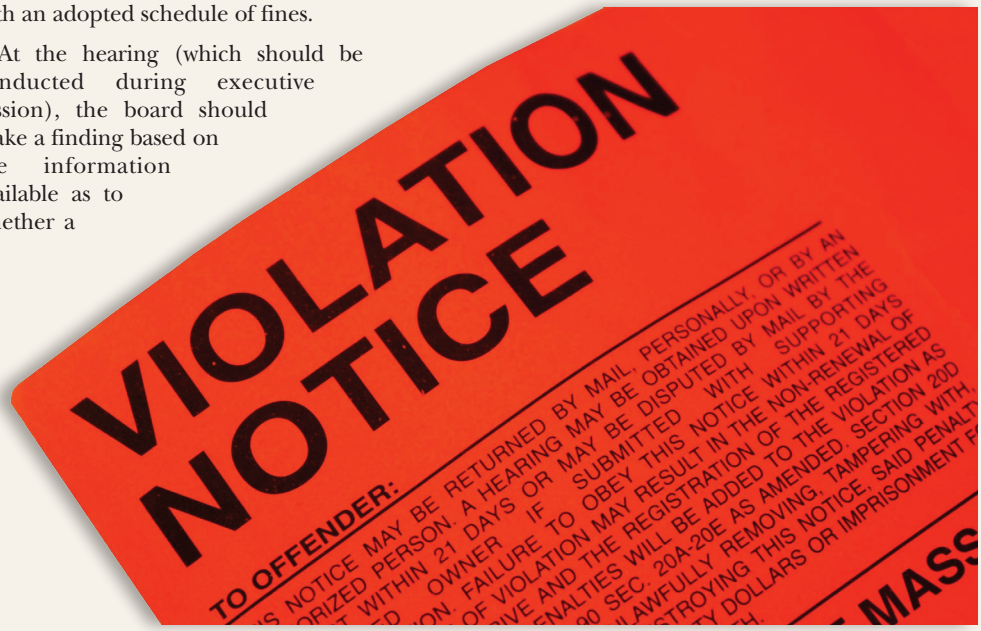
Similarly, an association's CC&Rs, bylaws, or rules and regulations might provide that the board can impose a fine against an owner and then notify the owner that he or she can request a hearing if the owner disputes the violation. Such a fine would also be invalid because due process was not provided before imposing the fine. Even if an association's governing documents purport to give the board authority to impose fines without first providing notice to the owner and conducting a hearing on the alleged violation, the statutory due process requirements of Civil Code §5855 control over any less restrictive governing document provisions.

Accordingly, when enforcing violations of an association's governing documents, boards must comply with the requirements of Civil Code §5855 in order to impose discipline (or to impose any monetary charge for reimbursement of costs incurred by the association to repair damage to the common area caused by an owner or the owner's guest or tenant). Civil Code §5855 requires that associations send a hearing notice, conduct a hearing, and send a notice of the hearing results for any discipline to be effective and valid.

The hearing notice informs the owner that the board has scheduled a hearing (to be conducted by the board in executive session) to consider the alleged violation. Under Civil Code §5855(a), the hearing notice must be delivered at least ten days before the scheduled date of the hearing. Civil Code §5855(b) requires that the hearing notice contain, at a minimum, the date, time, and location of the hearing, the nature of the alleged violation for which the owner may be disciplined, and a statement that the owner has a right to attend the hearing and address the board. The hearing notice should also cite to the specific provision(s) of the governing documents allegedly being violated and describe the discipline (e.g., fines, suspension of voting rights, etc.) that the board might impose if a violation is found to have occurred. The board should confirm that the association's governing documents authorize the proposed discipline, and any fines imposed must be in accordance with an adopted schedule of fines.

At the hearing (which should be conducted during executive session), the board should make a finding based on the information available as to whether a violation occurred and, if so, what discipline will be imposed, if any. If the board finds the owner in violation of the association's governing documents and resolves to take any disciplinary action against the owner, the owner must be sent a notice of the board's decision within 15 days after the hearing per Civil Code §5855(c). Under Civil Code §5855(d), any disciplinary action or any monetary charge for damage to the common area shall not be effective against an owner unless the board has fulfilled the requirements of Civil Code §5855.

If boards of directors need assistance to ensure compliance with all applicable requirements for enforcing a violation of the association's governing documents, they should consult legal counsel. The attorneys at Kriger Law Firm can assist in all aspects of enforcing an association's governing documents. ■

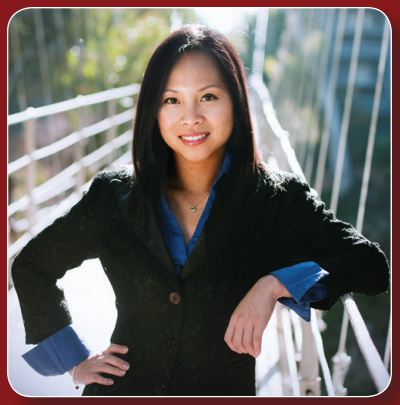


What's happening at Kriger LAW FIRM

Kriger Law Firm Welcomes Niki Tran!

Kriger Law Firm is pleased to announce that Niki Tran has joined the firm as an Associate Attorney. Niki brings with her a wealth of experience in litigation, contract disputes, commercial agreements, criminal law, and personal injury. She has analyzed, negotiated, and drafted complex legal documents and business contracts, including but not limited to, commercial leases, employment offers, partnership agreements. Niki graduated from Thomas Jefferson School of Law cum laude in 2011.

We are very excited to have Niki join our team, and we know you will love working with her. She is both personable and knowledgeable. Niki lives in San Diego with her husband and two children. Niki loves to spend time with her family, but when she is not doing that, she loves to swim, play tennis, and spend time on her hobby, glass etching.



Civil Harassment in Homeowner Associations

Bradley A. Schuber, Esq.

Congratulations! You recently volunteered to serve on the board of directors for your homeowner association, attended the first few meetings, and have made some thoughtful yet difficult decisions for the benefit of the community. Unfortunately, not everyone in the association is thrilled with the decisions, and as a result, one unhappy resident begins engaging in a pattern of harassment towards you, including abusive phone calls, offensive e-mails and verbal assaults in public. Unfortunately, the above scenario is not all that uncommon. In these situations, a question arises as to what an association should do and/or whether community funds should be used to address the issue?

Under California law a judge can issue an order enjoining a party from harassing, intimidating, attacking, stalking, assaulting, telephoning, mailing, e-mailing, or coming within a specified distance another person.

As a general matter, if a board member is being harassed, then the association should intervene to help the board member. A good first step is to have the association's attorney write a letter to the offending individual describing the behavior and letting him or her know that the behavior is not acceptable. Often there is an underlying problem that has caused the behavior. If the underlying problem can be identified and addressed through communication or mediation, then in many situations the behavior will dissipate.

However, if the matter can't be resolved through letters and communication on the underlying problem, then the next step in most situations is to seek a civil harassment restraining order. A civil harassment restraining order is an order that a judge makes to protect one person from another person. Under California law a judge can issue an order enjoining a party from harassing, intimidating, attacking, stalking, assaulting, telephoning, mailing, e-mailing, or coming within a specified distance another person.

Board members are of course able to seek civil harassment restraining orders on their own. However, an association may seek a restraining order to protect a board member as well. According to Code of Civil Procedure Section 527.8, an employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual may seek a restraining order. Under the statute a homeowner association would be considered an employer, and board members, volunteers, and independent contractors, such as property managers, would be considered employees.

With regard to the use of community funds, governing documents typically provide the Board of Directors with general authority to use such funds to preserve, protect and enhance the community. The grant of general powers in an association's governing documents is typically broad and would include preserving tranquility in the community and protecting employees from harassment in the workplace. As a result, the use of community fund is appropriate to protect board members and property managers from harassment.

Lastly, if community funds are used to pay legal fees to obtain a restraining order on behalf of an employee, then such fees are recoverable pursuant to California Code of Civil Procedure Section 527.6(s) which provides as follows: *"The prevailing party in an action brought pursuant to this section may be awarded court costs and attorney's fees, if any."*

In a recent unpublished case interpreting CCP Section 527.6(s), *Jorge Benlloch v. Allison Johnson* No. 18SMRO00054 (Cal. App 2nd June 4, 2019) the Court of Appeals for the Second Appellate District upheld an award of attorney's fees, where

the fees were paid by a homeowner association on behalf of a board member. In that case, the offending individual argued that an award of attorney's fees was not proper because the homeowner association did not have authority under its bylaws to pay a board member's legal expenses. The Court of Appeals was not persuaded by this argument and held that an award of attorney fees pursuant to 527.6 was not dependent upon an interpretation of association's governing documents. Moreover, the Court of Appeals noted that the statute only requires that attorney's fees exist, and that it is irrelevant that the fees were paid by the association.

In conclusion, it's reasonable for board members to anticipate a certain amount of criticism from members of the community, after all it's not possible to please all people all the time. However, when criticism crosses over into harassment, then board members should take action to protect themselves, and associations should take action to protect its employees, including where appropriate to seek a civil harassment restraining order. ■

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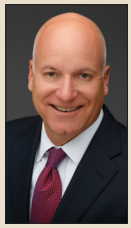
Managing Editor
Joel M. Kriger, Esq.

A "First Class" Ticket to Liability for Failure to Maintain



By Steve Banks, Esq.

A recent court decision has a lot of Associations reviewing their governing documents and reconsidering their maintenance programs. In *Sands v. Walnut Garden Condominium Association* (2019) 35 Cal.App.5th 174, unit owners sued their Homeowners' Association (HOA), and its property manager for breach of contract and negligence after a pipe on the roof broke and leaked water into their unit.

The court decision begins: "This case is about whether condominium owners can make their homeowners association pay for a water leak." Spoiler alert: The answer, at least, in this case, was "Yes."

The owners had settled with the property manager but went to trial against the HOA based on theories of negligence and breach of contract (the HOA's CC&Rs, which required it to keep the project in "a first class condition." At trial, witnesses testified the HOA was performing no preventive maintenance at all and that the roof and pipes over the unit had not been inspected or maintained in years. The Association's manager testified, "[m]aintenance wasn't happening. It was a very sad situation for the homeowners."

The HOA successfully brought a motion for nonsuit against the owners, arguing that (1) there was "a complete absence of evidence" to show a breach of contract; and (2) no evidence showed the association was "on notice that it needed to make repairs or do something to the roof or the pipes." The appellate court found both arguments to be incorrect since reasonable jurors could have concluded that (1) a total failure to maintain common areas breached a promise to keep these areas in "first class condition," and (2) buildings need maintenance to remain in "first class condition." However, the court reversed only the nonsuit judgment on the contract theory. It affirmed the nonsuit tort (negligence) judgment because "[o]utside the covenants, conditions, and restrictions, the association had no independent duty as to the pipes and roof arising from tort law," therefore legally barring any such claim.

Attorneys will argue for some time about whether it makes a difference that this case was brought as a breach of contract action rather than to enforce the CC&Rs, and what effect that might have on the recovery of statutory attorney fees. But for board members and managers, the main lessons to learn from this case are the following: First, projects must be regularly inspected and maintained, and records regarding inspections and maintenance should be kept to document these activities. Second, this case does not stand for the proposition that an HOA cannot be sued for negligence; however, the negligence must be based on the breach of a duty other than that arising from the CC&Rs. Third, if your CC&Rs are among the few that contain the vague "first class condition" language, it's time for an update to remove that language. ■