Kriger LAW FIRM News
Fourth Quarter · 2015

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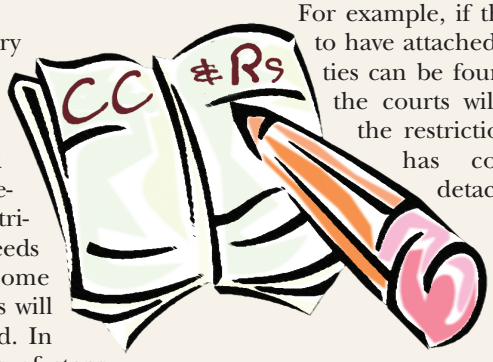
Reinstating Dormant CC&R Restrictions

By Joel Kriger, Esq.

Older associations often face the issue of CC&R restrictions that have been ignored by residents and not enforced by the board of directors for years. This occurs for different reasons. Sometimes violations of the rules are not noticed or ignored. Other times the Association does not have an active enforcement policy, allowing these violations to exist.

At some point in every Association, new leadership will be elected to the board and oftentimes it is determined that the lack of enforcement of these restrictions is detrimental to the community and needs to be addressed. In some instances, the restrictions will not be able to be revised. In other situations, a series of steps can be taken to reinstate the restrictions.



Not all dormant restrictions can be reinstated. Where the restriction has been ignored for years and violations are prevalent throughout the community, the courts will not allow the Association to suddenly impose restrictions on new or existing owners, determining that the restriction has been waived. This situation applies mainly to architectural violations. When the governing documents specify certain architectural restrictions and those restrictions have been ignored throughout the community, resulting in nonconforming structures, it will be very difficult to reinstate those restrictions.

For example, if the CC&R's require homes to have attached garages yet many properties can be found with detached garages, the courts will be reluctant to impose the restriction on an individual who has commenced building a detached garage.

In the recent case of *Villas in Whispering Palms v. Tempkin*, an unpublished appellate court decision, the Association sought to reinstate a restriction limiting owners to one dog. Over the years several members of the Association had maintained two dogs in their homes without any consequences. New leadership determined, after survey of the members, that a majority desired that the one dog restriction be enforced. This association was successful in reinstating the restriction but only after taking a series of steps.

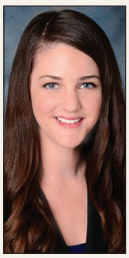
First, the board granted variances to all owners who had two pets. The variance permitted them to keep the two animals but not replace the dog if one died or left the home. In addition, other owners were granted variances for medical assistance animals. The membership was notified of these changes and that members who had one pet or no pets would be subject to strict enforcement of the rule.

Over the next several years the board uniformly enforced the rule and acted on violations whenever they were brought to the board's attention. A new owner who moved into the community several years after the rule was reinstated challenged its validity. The court held that the rule was enforceable because the board took reasonable steps to reinstate the rule, treated existing owners with two dogs fairly, granted variances when needed, and proceeded with enforcement in a uniform and equitable manner. ■

Recommendations for a Smoother Recall Process

SPECIAL CONSIDERATIONS FOR BOARDS AND MANAGERS

By Elizabeth Call, Esq.



Recalls often occur when a board of directors is acting inefficiently or when personality clashes occur between owners and board members. Recalls can also be "abusive" when they are used to impede business activities or harass the board. It is important for associations to understand the overall recall process and to take preemptive measures to ensure a smooth recall process.

The basic framework of the recall process is as follows: members sign a petition, notice of a special meeting is distributed, ballots are mailed, and finally the special meeting of the membership is held. In general, the membership may recall either an entire board of directors or individual directors. The process requires a petition signed by at least five percent (5%) of the membership to trigger the recall process under *California Corporations Code* §7510(e).

It is important to note that there are important time considerations during the recall process. The association then has 20 days from the date of receipt of the

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Artificial Turf Coming to an HOA Near You

APPROACHING THE CHALLENGES POSED BY DROUGHT CONDITIONS

By Jamie Handrick, Esq.

Many homeowners associations find themselves behind the times when faced with owners reacting to the drought by trying to conserve water by planting drought tolerant plants, installing xeriscape in their yards or ceasing to water their landscaping completely.

California Civil Code §4735 states in relevant part:

> *"**(a)** Notwithstanding any other law, a provision of the governing documents or architectural or landscaping guidelines or policies shall be void and unenforceable if it does any of the following:*
>
> > ***(1)** Prohibits, or includes conditions that have the effect of prohibiting, the use of low water-using plants as a group or as a replacement of existing turf.*
> >
> > ***(2)** Prohibits, or includes conditions that have the effect of prohibiting, the use of artificial turf or any other synthetic surface that resembles grass."*

Our office is often asked whether associations can fine owners for reducing or eliminating watering of vegetation or lawns. Based upon *Civil Code* §4735, since the Governor declared a state of emergency, associations cannot fine owners for failing to water their landscaping even though it reduces property values and is not aesthetically pleasing. However, there is one exception to this rule. Associations can fine an owner for failing to water landscaping when the owner has access to recycled water for the owner's landscaping.

Assembly Bill 786 was passed earlier this year as clean up legislation regarding *Civil Code* §4735(c). Because of the confusing language in *Civil Code* §4735(c), many associations which used recycled water to irrigate any part of the common area landscaping fined owners when they did not water, even when the owner did not have access to recycled water themselves.

AB 786 closed this loophole by clarifying that associations may only fine an owner for failing to water in times of drought if the owner has access to recycled water for irrigation but refuses to water their landscape. This change to *Civil Code* §4735 reinforces the legislature's intent to promote water conservation during the drought. It is also important to note, Associations are required to allow owners to install artificial turf and drought tolerant plants (which includes xeriscape) if they so desire.

We are recommending that boards of directors consult with their landscape professionals and general counsel to draft guidelines and rules regarding the installation of artificial turf and drought tolerant landscaping. For example, there are several types of artificial turf. Some artificial turf looks like foam sprayed with green paint. Other artificial turf closely resembles real grass. Associations can implement rules that require owners to install artificial turf that resembles grass to ensure the community remains aesthetically pleasing.

For the same reasons, Associations should develop color palettes and lists of approved drought-tolerant plants. That way, the landscape in the community will not look like "patch work." If you have landscape maintenance areas in your community where the owners own the land but the Association maintains the landscaping, please contact association counsel to assist with any complications that may arise as a result of owners requesting to make changes to these areas by installing drought-tolerant plants. ■

We are recommending that boards of directors consult with their landscape professionals and general counsel to draft guidelines and rules regarding the installation of artificial turf and drought tolerant landscaping.

The Right To Dry

CLOTHESLINE BILL ALLOWS BACKYARD DRYING; SOME LIMITATIONS APPLY

By Bradley A. Schuber, Esq.

Homeowners association members should be prepared to see their neighbors' laundry because effective January 1, 2016, California Assembly Bill 1448 will void any provision of a governing document if it "effectively prohibits or unreasonably restricts an owner's ability to use a clothesline or drying rack in the owner's backyard." Assembly Bill 1448 will be codified in *California Civil Code* at Sections 1940.20 and 4750.10 and defines a clothesline to include "a cord, rope, or wire from which laundered items may be hung to dry or air."

California is not the first state to pass a law forbidding bans on clotheslines. Other states have passed similar laws including Florida, Colorado, Utah, Hawaii, Maine, and Vermont. Supporters reason that it conserves energy, reduces utility costs, causes zero greenhouse gas emissions, eases pressure on the state's power supply, and causes less fabric wear and tear. Opponents argue that hanging laundry is aesthetically unpleasant, lessens privacy, and is more time consuming than mechanical dryers.

However, it is important to note that Assembly Bill 1448 does provide some limitations to drying laundry outdoors. Most notably a "clothesline" is not a balcony, railing, awning, or other part of a structure of a building. Thus, owners may not hang their laundry on structural or building components. In addition, Assembly Bill 1448 specifically provides that associations can adopt reasonable restrictions. It defines reasonable restrictions as "restrictions that do not significantly increase the cost of using a clothesline or drying rack."

As a result of the new law, associations that are updating their governing documents may want to consider amending their CC&Rs to remove provisions that prohibit the use of clotheslines where applicable. In addition, in communities where clotheslines become a problem, boards may want to adopt reasonable rules concerning time, place and manner of hanging clothes. ■

SMOOTHER RECALL PROCESS CONTINUED FROM PAGE 1

petition to distribute a notice of a special meeting of the members. The purpose of the special meeting of the members is to hold a recall meeting and tabulate votes. The recall meeting shall take place 35 to 90 days after the recall petition is received. Ballots and voting materials must be sent to the membership at least 30 days before the meeting under *California Civil Code* §5100.

The recall process presents complexities and challenges depending on varying facts and circumstances. The following items represent special considerations for boards and managers.

CUMULATIVE VOTING: If an association's bylaws permit cumulative voting, recalling individual directors becomes a more difficult process than removing the entire board of directors. Because of the complexities of tabulating votes, the board may wish to employ a professional Inspector of Election (IOE). An IOE serves as a neutral party who conducts the recall process. The IOE works alongside counsel, to ensure that all deadlines and statutory requirements are met.

EXISTING RESTRICTIONS: An association's governing documents may already contain language that restricts the recall process. If the governing documents permit suspension of members' voting rights, and that restriction is exercised, then the percentage required for the petition process will be altered. For example, in an association with 200 members, 10 members must sign the petition for recall to establish the 5% requirement. In that same Association, if 20 members are suspended at the time of the petition process, only 9 signatures (5% of 180) are required to pass the petition stage of the recall process.

GOOD STANDING CRITERIA: If an association's governing documents require that only members in "good standing" may run for Board positions, then the same rule will apply in the event of a recall. In other words, if the recall is successful, only Members who are considered to be in good standing may be elected at a recall election. Another provision to look out for is one that restricts recalled board members from running for a specific time period after they have been recalled. These provisions are not common, but may materially alter the recall process. Association's legal counsel can quickly identify such restrictions.

Governing documents may alter the trajectory of the recall process. There are provisions that an association can modify to mitigate problems and complexities for future recalls:

ELIMINATE CUMULATIVE VOTING: Cumulative voting presents complications in the recall process, especially when the recall does not apply to the entire Board. Eliminating cumulative voting by way of a bylaw amendment should simplify the overall process.

LIMIT RECALLS TO ONCE PER FISCAL YEAR: Limiting the number of recalls per year will reduce the risk of abusive recalls. Without a cap on recalls, a small percentage of the membership has the ability to waste time and resources by calling repeated recalls. Of course, the danger with this restriction is that if there is truly a need for a recall of the board, the membership will have to wait for the next fiscal year to conduct the next recall. In summary, an association has some ability to control the recall process by amending its governing documents. The overall recall process is fairly straightforward but can be made easier with the use of professionals such as legal counsel or IOE. ■

ERRONEOUS NOTICE MAY NOT AFFECT VALIDITY OF MEETING

By Garrett Wait, Esq.

In an important non-HOA case that could have implications for homeowners association, a California Court of Appeal ruled that minor errors in meeting notices would not be considered a violation of the Brown Act. This could impact the notice requirements for HOA board and membership meetings under the Open Meeting Act codified in the Davis-Stirling Act.

In *Castaic Lake Water Agency v. Newhall County Water Dist.* (2015) 238 Cal. App. 4th 1196. 2013, the Newhall County Water District attempted to hold a closed-door session with its general counsel during a regularly scheduled public meeting. Newhall noticed the meeting properly, but cited the incorrect subsection of the Government Code when giving notice of the closed session portion of the meeting.

The Castaic Lake Water Agency sued Newhall in attempt to have the meeting invalidated, noting that the incorrect subsection of the Government Code was cited, alleging that this was a statutory violation of the Brown Act. Castaic Lake argued that the statutory notice requirement must be viewed with an eye toward strict compliance. The Court of Appeal disagreed, stating that the minor error did not affect the validity of the meeting notice, essentially ruling that typos can be forgiven under the Brown Act.

Homeowners associations are bound to give notice of meetings under the Open Meeting Act, which closely mirrors the language in the Brown Act. This ruling suggests that minor errors or deficiencies in meeting notices should not invalidate a board meeting. Although boards should still be careful to follow the law as best they can when giving notice of board and membership meetings, boards should know that perfection is not the proper standard for review. An error or omission that could be considered a minor deficiency should not invalidate the meeting as a whole. ■

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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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