Kriger LAW FIRM News

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Election Issues and Potential Changes

By Garrett Wait, Esq.

The Davis-Stirling act sets forth rules for conducting elections to an HOA board of directors. Beyond certain basics, existing law leaves many aspects of the association elections process to the discretion of the association, including the board itself, in keeping with the legislative and judicial preference for autonomy in HOAs. However, that is set to change on January 1, 2020 because of the passage of Senate Bill 323, signed into law by the Governor on October 13, 2019.

Proponents of the new law make the unverified claim based on anecdotal evidence that incumbent boards have seized upon their legally protected discretion to undermine the democratic function of the elections by, among other things, disqualifying members from running for the board, limiting members' ability to vote, and rigging the balloting procedures. To support these allegations, the author of SB 323 pointed to the story of an Oxnard man who was not on title to his property at the time his HOA's nominations were due, and whose name was not included on a ballot. This is the only anecdote used to support a sweeping change to the deference HOAs have enjoyed since the creation of the Davis-Stirling Act.

While the purported intent of the bill may be a noble one, it goes too far, and will lead to increased costs to Associations and homeowners, all to fix a problem of dubious applicability.

To prevent such "manipulation" of the process, some legislators proposed SB 323, which would enact a series of reforms to the laws governing HOA elections. Of note, the bill would: (1) require that elections take place at regular intervals; (2) prohibit HOAs from disqualifying members from running for the board of directors except on narrow, specified grounds; and (3) restrict HOAs from "disenfranchising" members.

While the purported intent of the bill may be a noble one, it goes too far, and will lead to increased costs to Associations and homeowners, all to fix a problem of dubious applicability. It seems that the drafters of SB 323 latched on to one story about an allegedly disenfranchised HOA resident and created a piece of legislation to ensure that doesn't happen again. But the broad language and the removal of certain important provisions, leaves Associations far too vulnerable to manipulation.

Until January 1, associations have significant power to self-govern and set the qualifications for service as a director. Every HOA is supposed to have election rules in place that specify the qualifications for candidates for the board and any other elected position, and the procedures for the nomination of candidates, consistent with the governing documents. Election rules also are supposed to specify the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, consistent with the governing documents. That scheme grants associations broad authority to govern as they see fit and were not in need of radical structural change. After all, who is in a better position to determine its own leadership and voting structure than the Association?

Starting January 1, 2020, associations cannot disqualify homeowners who failed to pay fines, costs of collection, late charges, or costs levied by a third party. Indeed, a homeowner cannot be disqualified for nonpayment of *regular and special assessments* if the person has paid the regular and or special assessment under protest or has entered into a payment plan. This leaves the association vulnerable to an elected director lobbying the remaining board members to forgive his or her debts to the Association, or deciding not to pay per the payment plan terms following nomination to the board. Previously, Associations had the absolute right to disqualify members who were behind on assessment payments, which was just and fair for all members. After all, why should the Association allow a member to serve as a director if that member refuses to pay his or her fair share?

The new law has appropriately been labeled a nightmare bill by homeowners associations. The right to self-governance is significantly impacted and more bad board members may be elected to serve on boards. Bad board members lead to bad board decisions, which often leads to increased costs to homeowners.

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While those effects may take some time to materialize, the near future will require HOAs to spend money revising election rules when the new law takes effect. This could be several hundred dollars of HOA funds that were not anticipated. Moreover, management companies or any other vendor under contract with an HOA are prohibited from serving as inspectors of elections. HOAs now can either nominate one or three homeowners to serve in such a role or hire a professional inspector of elections. Both have their drawbacks, clearly.

There are other issues that HOAs will need to address as of January 1, 2020 in the election rules, but the most important thing to remember is that the elections rules *must* be updated no less than 90 days prior to the next election. Please do not hesitate to call our office to get a bid for an election rules update. ■

Two Recent Decisions Make Collecting More Difficult

By Garrett Wait, Esq.

Two recent bankruptcy court decisions are conspiring to wreak havoc on homeowners associations' ability to collect assessments. The rulings in *Goudelock v. Sixty-01 Association of Apartment Owners* (2018) 895 F.3d 633 and *In re: De Guillen* (2019) BAP No. CC-18-1248-LSTa create a virtual minefield associations must navigate when attempting to collect assessments from debtors who are in Chapter 13 bankruptcy or have received a discharge.

The *Goudelock* decision stated in no uncertain terms that a debtor whose debts are discharged after a Chapter 13 bankruptcy can *never* be sued for collection of homeowners association assessments again. The Court stated that the "debt for future assessments [is] dischargeable, which the court held was 'consistent with the Bankruptcy Code's goal of providing debtors a fresh start.'" The Court in *Goudelock* posited that homeowners associations remain able to enforce assessment obligations via the lien and foreclosure process, but that association cannot sue delinquent owners once they have received a discharge, even if the debt arises *after* the discharge and is entirely new.

Meanwhile, in *In re: De Guillen*, the Court struck another blow to associations' ability to collect assessments by stating that assessment liens only secure assessments through the date of filing of a debtor's bankruptcy petition. Before that Court's decision, association liens had relied on the decision in *Bear Creek Master Ass'n v. Edwards* (2005) 130 Cal. App. 4th 1470, allowing assessment liens to act as continuing liens that secure post-petition debts. The decision of the Court in *In re: De Guillen* prohibits that and leaves associations in a precarious position when attempting to fulfill its obligations to the membership.

Associations have a duty to levy and collect assessments per Civil Code Section 5600, and all associations need money to operate. That duty had previously been considered sacrosanct by the *Bear Creek* decision, but the two recent bankruptcy decisions call into question exactly how associations can adequately collect those assessments. *Goudelock* makes it impossible to sue a debtor following a discharge and *In re: De Guillen* states that liens only secure the amounts through the date of recordation of the lien. If, for example, an association records a lien in January, the debtor fails to pay assessments thereafter, then files bankruptcy in November, that association cannot then claim the 10+ months of assessments as secured by the lien. Should the association then record liens every single month? To secure the entirety of the obligation, it would have to record successive liens, but that's an absurd result.

Associations are now in a position that they must make decisions regarding the successive recording of liens and the subsequent recording of liens post-discharge. Our recommendation, for now, is that associations review their outstanding liens on a recurring basis to avoid losing significant sums of money per the *In re: De Guillen* decision. They should also pursue foreclosure of liens more aggressively, including in some cases when there is little-to-no equity in the property. Further, once a debtor receives a Chapter 13 discharge – and remains in the property and subsequently becomes delinquent – the association must pursue its lien and non-judicial foreclosure rights.

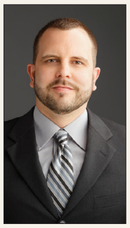
Unfortunately, these decisions will leave the association with unpaid assessments for which there simply is no recourse. The good news is that – as of now – these decisions can be limited to debtors who are in Chapter 13. Associations must be more diligent than ever in reviewing delinquencies, re-recording liens, and initiating foreclosure. The apparent effect is that associations may end up being *more* aggressive in pursuing delinquent owners than they were prior to these decisions. If you have questions about how your association can meet its obligations to collect, please don't hesitate to call our office. ■

What's happening at Kriger LAW FIRM

Welcome Back, Garrett!

We are thrilled to welcome back Garrett Wait to Kriger Law Firm as a Senior Associate! Garrett spent five years at Kriger Law Firm, guiding the collection court department, assisting associations with general counsel work, including drafting vendor agreements, revising governing documents, and prosecuting CC&R enforcement actions. Garrett rejoined Kriger Law Firm after two years as a civil litigator in San Diego and Orange County, focusing on business and real estate matters. Garrett is both personable and knowledgeable. If you didn't work with Garrett previously, we know you will enjoy working with him in the future. If you would like to reach Garrett, you can email him at gwait@krigerlawfirm.com.

Association BEWARE: Don't Fall Prey to Another Automatic Renewal Clause



By Tyler Kerns, Esq.

***Eisen v. Tavangarian*, 36 Cal. App. 5th 626 (Cal. Ct. App. Jun. 20, 2019)**

Architectural Control: The Court of Appeal of California held that, although subdivision covenants expressed view protection concerns for initial home construction, the expiration of architectural control powers meant that no approval was required for home remodels, even where such remodel obstructed views from other lots.

Glen and Alison Eisen (the Eisens) owned a home in the Marquez Knolls subdivision in Pacific Palisades, Calif. In 2012, Ardeshir and Tania Tavangarian (the Tavangarians) purchased the property across the street from the Eisen property. The Tavangarians purchased the property for the remodeling of the existing home for resale. Both homes had ocean views, but the Eisens' primary view was over the roof of the Tavangarians' house.

When the Tavangarians purchased the home, it was L-shaped. One side of the "L" was two stories, and the other side was one story. Beginning in 2013, the Tavangarians began remodeling the home. They replaced the rooftop air conditioner units with new units and equipment. The second story western wall was extended by more than 5 feet (the privacy wall) and the south wall by more than 4 feet. The second story roof was extended by cantilevering it out by 8 feet to meet the new privacy wall. A second story deck was added that also had a cantilevered roof. New, tall privacy hedges also were added.

The Eisens sued the Tavangarians in September 2013 as the remodel was nearing completion, claiming the remodel violated three of the subdivision's restrictive covenants. First, the covenants provided that no building other than a single-family dwelling, not to exceed one story in height, was permitted to be erected, altered, or allowed to remain, except that the original developer and the architectural committee could approve a two-story dwelling where it would not detract from the view of any other lot.

Second, the covenants prohibited the alteration of any structure without approval by the architectural committee as to conformity and harmony of exterior design with existing structures in the subdivision and location of the building with respect to topography and finished ground elevation. However, the covenants specified that the committee's powers expired at the end of 1980. Third, the covenants forbade any fences or hedges exceeding 3 feet in height from being erected or permitted to remain or any tree, shrub, or other landscaping planted, or any structures built that obstructed the view from any other lot.

The trial court concluded that a home could be remodeled only if the changes did not detract from the view of any other lot. It found that most of the Tavangarians' exterior changes violated the covenants. In particular, the trial court found that the privacy wall and the cantilevered roof unreasonably obstructed the Eisens' view, and it ordered both to be removed.

The trial court further found that the new, larger air conditioning units on both the first- and second-story roof obstructed views, and the Tavangarians were ordered to replace the equipment with significantly less obtrusive equipment. Finally, the trial court found the hedges violated the height restriction. The trial court awarded the Eisens $39,000 as interim damages for the view loss during the duration of the lawsuit. The Tavangarians appealed.

The appeals court found that, although the basic one-story limit applied whether a dwelling was initially constructed or altered, it did not otherwise restrict the renovation of a single-story residence. Once a second story was initially approved by the original developer or architectural committee, the one-story limit had no further role and imposed no restrictions on the renovation of the home. The appeals court rejected the Eisens' contention that, once a second story was initially approved, the second story could not thereafter be modified in any way that enlarged its contour or silhouette, finding that such interpretation would fail to give effect to the covenant requiring architectural approval.

Both parties agreed that the architectural approval requirements had expired in 1980, but they disagreed as to the consequences of such. The Eisens argued that, once architectural review ceased, there could be no architectural changes because there was no entity to approve the changes. The appeals court disagreed, holding that the absence of an entity with authority to review and approve building plans nullified the requirement for plan approval. Nowhere did the covenants indicate an intent to prohibit remodeling a home after the architectural committee ceased.

Further, the covenant prohibiting any landscaping from being planted or structures erected that may obstruct the view from any other lot applied only to erecting a structure, not making alterations to one. Although a dwelling is a "structure," the appeals court determined the context required that the structures regulated by this covenant were limited to outbuildings and similar objects surrounding the dwelling, not the main dwelling itself. The appeals court determined it was not logical to restrict buildings by the catchall phrase "other structures" in a paragraph devoted to hedges, walls, and fences.

Accordingly, the trial court's judgment was reversed except as to the order requiring that the hedges be trimmed and maintained at the height of 3 feet or less. ■

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Subdivision Covenants Did Not Protect Views in Perpetuity

By Niki Tran, Esq.

Homeowner associations enter into a variety of contracts and service agreements with a myriad of vendors and suppliers to provide essential services (i.e., waste management, landscape maintenance, security, and so forth) to the community and the residents. All too often, associations enter into service contracts without realizing the terms that would paralyze their right to terminate and are now trapped by the automatic renewal clauses in the contracts.

Automatic renewal clauses, often referred to as evergreen clauses, lurk in many service contracts/agreements. The provision causes a contract to automatically renew at the end of its term unless the Association gives written notice to terminate the contract. Sounds simple, right? Unfortunately, no (or else this would be a very short article). Turns out terminating a contract with an evergreen clause is not that simple. A contract with an automatic renewal clause often requires a strict 30-, 45-, 60- or 90-day notice period to terminate. Some may even require a notice of intent not to renew no less than 90 days but no more than 180 numbers of days before the end of the current contract term. Failure to give notice within the specified period means the contract automatically renews for another term upon completion of the existing term.

Boards and managers have likely come across at least one service contract with a provision that states that the contract will automatically renew. Many vendor/service provider contracts include a one-year term with a clause that states that the contract will automatically renew each year for successive one-year terms because CC&Rs generally have a one-year limitation on contract terms (with some exceptions for certain types of contracts).

Often Associations are locked in a contract that automatically renewed until the next term because the Association missed the required notice period to terminate. In such situations, what options are available to the Association? Put up with another year of unsatisfactory services? Forgo a more competitive offer? Terminate early? The Association can terminate early; however, the contract likely has a liquidated damage clause for early termination. This clause sets the amount for damages in the event the Association breaches the contract by terminating it early. However, the Association can avoid the termination fees if the Association can show that there was a material breach of the contract on the part of the service provider. A violation of the contract would give the Association a basis to terminate the contract early and avoid termination fees.

Automatic renewal clauses are generally enforceable in California; therefore, unless there has been a material breach of the contract by the service provider, such as failing to provide the services specified in the contract, the clause creating the automatic renewal will likely be enforced. If the Association is currently trapped in a contract with an automatic renewal clause, we strongly recommend that the Association calendar the future termination notice date/period so that it will not be missed. Although it is common practice for service providers to include an automatic renewal clause in their contracts, they often go unnoticed when the contract is negotiated; therefore, it may be prudent to provide legal counsel copies of contracts of this nature for review and negotiation before execution. ■