Kriger LAW FIRM News

First Quarter · 2018

HOAs Go Solar

By Joel Kriger, Esq.

Two recent legislative changes that took effect in 2018 have created the need for associations to adopt rules to address these new requirements. The first legislative change, contained in Civil Code sections 714.1 and 4746, regards installation of solar energy systems on multifamily common area roofs. The legislation, while requiring associations to allow the installations, also permits reasonable restrictions to be imposed on the installing owner to protect the Association's common area roof, require insurance, cover costs for damage to common area, take responsibility for future maintenance, repair, and replacement of the solar energy system and disclose to prospective buyers the existence of the system and their future responsibilities. The purpose of the rules is to outline the process for approval and the restrictions imposed on the owner who seeks to install the solar energy system.

The second legislative change is found in Civil Code section 4515 and extends the rights of members and residents in a common interest subdivision, with regard to peaceful assembly and free communication with one another and with others with respect to the community for social, political, or educational purposes. This legislation requires associations to allow certain free speech and peaceful assembly activities while also requiring it to make available, at no cost, common area facilities including the clubhouse, allowing owners and residents to engage in these activities. Adoption of rules consistent with the legislation will permit the Association and Board to avoid being assessed a civil penalty of $500 for violations if any of the rights contained in the legislation are infringed. The rules will set out those rights and limitations to properly guide the Board and management in dealing with these issues.

We are recommending to our clients adoption of these rules and will provide a bid upon request. You may contact Candace Schwartz at cschwartz@krigerlawfirm.com or 619-589-8800 x 307. ■

In This Issue:

Can Peacocks Provide Emotional Support?

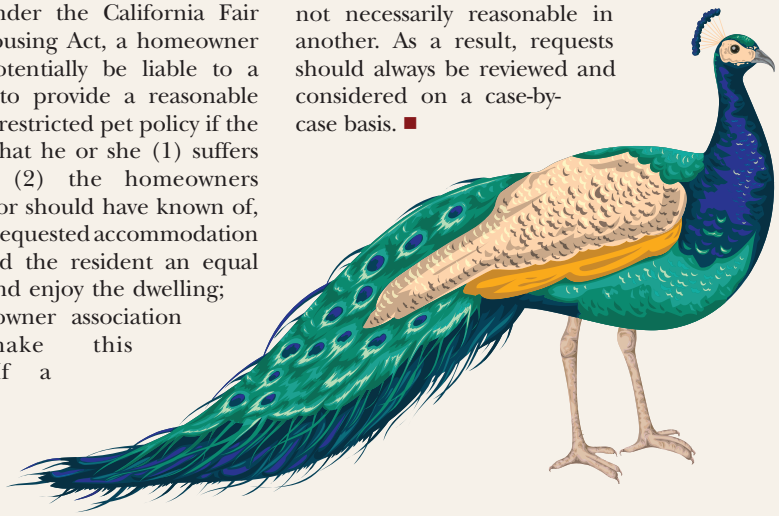
Bradley A. Schuber, Esq.

Earlier this year a female traveler attempted to board a United Airlines flight leaving Newark, New Jersey and bound for Los Angeles, California with her emotional support peacock. When the airline refused to let her board, she offered to buy the bird its own plane ticket. However, the airline told the female traveler that the bird did not meet the airline's guidelines due to its weight and size. Since the incident, it's been reported that United Airlines has tightened up their policies regarding emotional support animals, particularly for exotic animals. However, an interesting question arises as to whether or not a homeowners association would have to permit a resident to have a less traditional emotional support animal such as a peacock? The answer in California is potentially.

As a general matter, emotional support animals differ from other animals in that they assist individuals, who usually have some type of psychiatric disability, without necessarily receiving any kind of training. While their counterparts (service animals) receive training to perform specific tasks, emotional support animals simply provide comfort by their mere presence. Some examples of emotional support include providing companionship, soothing people who suffer from depression, making someone feel secure, motivating people to be more active, extending unconditional love, etc. So, without any requirement for formal training, it would seem that a wide range of animals could arguably provide comfort and support. In addition, whether or not an animal provides comfort to someone seems to be somewhat subjective. While dogs and cats appear to be the preferred animals for emotional support, there have been a number of lawsuits in the United States regarding other less traditional emotional support animals, such as birds, horses, monkeys, and opossums.

In California, homeowner associations should be mindful of potential discrimination claims from residents regarding emotional support animals. Under the California Fair Employment and Housing Act, a homeowner association could potentially be liable to a resident for failing to provide a reasonable accommodation to a restricted pet policy if the resident establishes that he or she (1) suffers from a disability; (2) the homeowners association knew of, or should have known of, the disability; (3) the requested accommodation is necessary to afford the resident an equal opportunity to use and enjoy the dwelling; and (4) the homeowner association refused to make this accommodation. If a resident is able to meet the above requirements, then the homeowners association could potentially be liable to the resident for discrimination even if the emotional support animal is less traditional.

If your association receives a request for a reasonable accommodation for an emotional support animal, then we recommend reviewing and responding to the request in a timely fashion, maintaining a respectful and open line of communication with the person making the request, and consulting with the association's legal counsel for advice to determine if providing a reasonable accommodation is appropriate based on the circumstances. It's important to remember that these requests are usually fact specific. What is sometimes reasonable in one instance is not necessarily reasonable in another. As a result, requests should always be reviewed and considered on a case-by-case basis. ■



Association's Duty to Engage in Interactive Process with Disabled Tenant/Resident Owner Following Accommodation Request

By Steve Banks, Esq.

HOAs need to be proactive – and interactive -- in responding to disability notifications and related disability accommodation requests from residents. They cannot wait for residents to initiate a dialogue to determine effective reasonable accommodations, if any. Failure to engage in a timely, good faith, interactive process with residents may expose the HOA to liability for discrimination in housing.

California's Fair Employment and Housing Act ("FEHA"; Government Code § 12900 et seq.) declares that disability discrimination in housing is against public policy, and that the opportunity to "seek, obtain, and hold" housing without disability discrimination is a civil right. "Disability" is broadly defined in FEHA and includes medical conditions, mental disabilities, and physical disabilities. Discrimination includes "refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to

The interactive process is intended to "clarify what the individual needs and identify the appropriate accommodation."

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Homeowners Should Take Heed Before Interfering with Homeowners Association's Vendors

By Lori F. Bessler, Esq.

In the recent case of *Presidio Community Association v. Dulgerian*, the California Court of Appeal held that homeowners who interfered with their homeowners association's landscaping contractors could be sued and were not protected by the right of free speech.

Greg Dulgerian and Melanie Belger owned property within the Presidio Community Association. In 2015, Presidio decided to replace grass with drought-resistant plantings in the common areas and other areas under the association's control. One reason for this decision by the Board was to qualify for rebates from the local water district. Another was the potential for lowering Presidio's water bills during the drought.

Dulgerian and Belger protested against the replacement project to the Board, management, through e-mails, letter and appearances at board meetings. They ordered Presidio's landscapers off their property and threatened to call the police if they did not leave. The landscapers completed the replacement project for all of the homes except for Dulgerian and Belger.

Although the case is unpublished, the message here is clear. Interfering with an association's vendor is conduct, not protected activity or the exercise of "free speech". Cease and desist or prepare to be sued!

Presidio sued them for breach of the association's governing documents and declaratory relief seeking an injunction preventing the defendants from interfering with the association's landscape contractors. At Presidio, the residential front yards were considered "nonprivate yard areas" under association control.

Dulgerian and Belger moved to dismiss Presidio's lawsuit, asserting that Presidio was suing them for protected speech, i.e., the protests they had made to the Board and emails to management objecting to the grass replacement project. The trial court disagreed, finding that the conduct at issue in Presidio's complaint was not based on any protected activity, including the right to free speech. The Court of Appeal agreed.

The Court of Appeal recognized that the complaint was not based on defendants' protests about the grass replacement project, but was based on their conduct in running the landscapers off their nonprivate yard areas when the contractors tried to replace the grass with drought-resistant landscaping. As such, the Presidio was seeking an injunction to stop conduct, not speech. If granted, the injunction would affect only their ability to obstruct the landscapers in their efforts to replace the grass.

Although the case is unpublished, the message here is clear. Interfering with an association's vendor is conduct, not protected activity or the exercise of "free speech". Cease and desist or prepare to be sued! ■

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of Professional Real Estate Management on her Lifetime Achievement Award from CACM at the 2018 Law Seminar Expo.

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ASSOCIATION'S DUTY TO ENGAGE IN INTERACTIVE PROCESS WITH DISABLED TENANT/RESIDENT OWNER FOLLOWING ACCOMMODATION REQUEST

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afford a disabled person equal opportunity to use and enjoy a dwelling." An accommodation request is "reasonable" if the requested accommodation seems "feasible" or "plausible." (*US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 402).

In *Auburn Woods I Homeowners Assoc. v. Fair Employment and Housing Commission* (2004) 121 Cal.App.4th 1578, 1592, an HOA denied a married couple's request for a companion dog as an accommodation for their severe physical and mental disabilities. The Auburn Woods court noted that it is incumbent on landlords to request documentation or open a dialogue if skeptical of a tenant's alleged disability or of whether accommodation is possible, and that it makes sense to place this burden on the landlord, who is not disabled.

The interactive process is intended to "clarify what the individual needs and identify the appropriate accommodation." (*Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1112.) Essentially, the reasonableness of an accommodation request can only be determined through the interactive process, and FEHA "affirms the importance of the interactive process... in determining a reasonable accommodation." (Cal. Govt. Code § 12926.1(e).)

FEHA employment-related cases have held that failure to engage in the interactive process is "a separate cause of action" under FEHA, and that liability may follow "if a reasonable accommodation would have been possible." (*Barnett v. U.S. Air, Inc.*, supra, 228 F.3d at p. 1116.) While no California case has yet directly addressed the issue in a FEHA housing setting, principles from FEHA employment cases are often applied in FEHA housing cases. (See, *Brown v. Smith* (1997) 55 Cal.App.4th 767, 782.)

Accordingly, once disabled residents request a disability accommodation – regardless of whether the request appears unreasonable – HOAs should initiate a dialogue with the resident to request the information needed to evaluate the requested accommodation and contemplate any alternatives. ■

A Day Playing Golf with CAI-Greater Inland Empire Shannon Miller, Brad Schuber, Brian Bruce, Candace Schwartz & Tom Freeley