Kriger LAW FIRM News

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In This Issue:

Limits Placed on Board Member Protection From Liability

By Joel Kriger, Esq.

A recent decision by the California Court of Appeal in the case of *Palm Springs Villas II v. Parth* has narrowed the liability protection available to board members under the Business Judgment Rule. The Business Judgment Rule refers to a judicial policy of deference to the business judgment of directors in the exercise of their broad discretion in making Association decisions. Under this rule, a director is not liable for a mistake in business judgment which is made in good faith and in what he or she believes to be the best interests of the corporation, where no conflict of interest exists.

Parth, the Board President of Palm Springs Villas, was sued over actions she took on behalf of the Association. The first had to do with a contract for roofing repairs. The cost of the repairs was significant and paying for them required a special assessment which the membership voted against. Subsequently, Parth obtained a board resolution to proceed with the roofing repairs on a time and material basis with no written contract. Invoices totaling $1.19 million were incurred. In order to pay for the work, Parth signed promissory notes totaling $1.19 million dollars. Members were never informed about the loans nor approved them. The Association's governing documents required membership approval for loans of this nature. Expert witnesses later testified that

CONTINUED ON PAGE 4

Coyotes on the Horizon

HOW TO MANAGE PREDATORS WITHIN COMMON INTEREST DEVELOPMENTS

By Elizabeth Call, Esq.

Coyotes are a controversial species within Southern California. As Southern Californians, we live amongst them and often struggle with the balance of coexisting with these predators in urban settings. Homeowners associations and the residents within them have faced problematic coyotes in Common Interest Developments, and have several options to deal with the omnivorous canines.

In San Diego County, Animal Services and the San Diego Police Department refrain from getting involved with coyotes unless a coyote bites a human or unless an injured coyote is reported. In general, California law permits humans to kill a coyote if the coyote poses an immediate danger to human life or property. However, in a non-emergency situation, the laws are less clear. State laws defer to local ordinances to govern how the coyote may be killed.

Encourage residents to keep their distance and to report coyote sightings. Boards should also use licensed professionals and should deter residents from taking matters into their own hands.

- Firearms: Local ordinances include firearms restrictions (discharging a firearm in a safe manner). Generally, discharging a firearm within a California city is not permitted and is therefore not recommended.
- Trapping is a method of capturing and killing an animal, and in the case of coyotes, usually includes metal leg clamps and snares. The animal is either killed while caught in the trap, or is killed by the trapper when the trapper comes to check the trap. Trapping has a reputation for being inhumane, but is nonetheless a legal method to trap coyotes in certain circumstances. (*State of California, Department of Fish and Wildlife,* DFW 1 389d). It is also worth mentioning that trapping requires a license.
- Humane Trapping: Humane trapping is a live trap or cage that does not harm the animal. Owners may employ licensed professional trappers to assist with this method (as well as with lethal trapping).

Coyotes in Common Interest Developments:

When considering coyotes within homeowners associations, there are special considerations. Common Interest Developments (CIDs), convey a shared ownership in common areas. In other words, all owners have equal rights to shared spaces. When considering who may kill or trap a coyote in a CID, we defer to the specifics of the situation. If a coyote poses a true immediate threat to human life or property, then residents should act to protect themselves within reason (and adhering to local laws relating to firearms). However, if a resident wishes to explore extraction or termination, the

CONTINUED ON PAGE 3

Court Further Defines "Prevailing Party"

By Bradley A. Schuber, Esq.

An association has many expenses that it incurs in its day-to-day operations, including management fees, maintenance costs, insurance expense, and of course legal fees. For the most part, these expenses are just part of an association's cost of doing business. However, unlike other expenses, legal fees can be recovered under certain circumstances. One such circumstance relates to enforcement of restrictive covenants under the Davis-Stirling Act. More specifically, California *Civil Code* Section 5975(c) provides that "in an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

In a recent case interpreting Section 5975(c) entitled, *Almanor Lakeside Villas Owners Association v. James Carson,* et al. 246 Cal. App.4th 761 (2016), the 6th Circuit Court of Appeal upheld a trial court's award of attorney's fees. In *Almanor,* the plaintiff was a homeowners association where defendants James and Kimberly Carson owned properties. Almanor filed suit to enforce restrictions relating to short-term vacation rentals. In addition, Almanor sought to recover over $50,000 relating to eighty-eight separate fine claims and other expenses.

After hearing the case, the trial court awarded Almanor $6,620.00 for eight of its fine claims and other expenses, and $101,803.15 in attorney's fees. The Carsons appealed the trial court's decision. Upon review, the Court of Appeal affirmed, and provided analysis regarding recovery of attorney's fees under the Davis-Stirling Act.

First, the court observed that while the Davis-Stirling Act does not provide a definition for a "prevailing party," California courts have concluded that the test for prevailing party is "whether a party prevailed on a practical level by achieving its main litigation objectives." Here, the court reasoned that despite the reduction in fine claims and overall monetary award, that Almanor was still the prevailing party as it had met its litigation objective and satisfied the first part of the statutory criteria under the Davis-Stirling Act "to enforce the governing documents."

Second, the court also observed that a trial court has broad authority in determining the reasonableness of attorney's fees, and that the extent of a plaintiff's success must be considered. Here, the court noted that while Almanor prevailed on only a minor subset of the fines, that the subset was sufficient to satisfy the statutory criteria, and established a baseline from which it can continue to adopt and enforce reasonable restrictions. Therefore, the fees incurred did not need to be apportioned or reduced based upon the quantity of fines awarded. As a result, the court affirmed the trial court's decision regarding reasonableness of attorney's fees.

It is important to note that the foregoing is an abbreviated summary of the court's analysis, and while Almanor received a favorable result, the recovery of attorney's fees cannot be guaranteed. As a result, associations should always seek advice from counsel regarding recovery of attorney's fees prior to filing an enforcement action. ■

Marketability Can Be A Problem After Trustee's Sale

By Garrett Wait, Esq.

Non-judicial foreclosure is one of the most powerful tools a homeowners association has to enforce the assessment provisions of its governing documents. The ability to foreclose on a lien without needing to spend hours in a courtroom is vital to the success of homeowners associations, but there are certain pitfalls as well.

When an Association forecloses on a property for delinquent assessments, the Association's credit bid may end up being the winning bid at auction. This leaves the Association on title, which in turn can cause headaches for a board of directors simply trying to get the Association its money. One of the ways some Associations have attempted to recoup lost funds is by trying to sell the property once the Association is the titleholder. However, they often run into an issue regarding the marketability of title when seeking title insurance. Certain title companies are reluctant to issue title insurance on property following a non-judicial foreclosure sale based on their reading of *Garfinkle v Superior Court* (1978) 21 C3d 268.

In the *Garfinkle* case, a foreclosed homeowner sought to challenge California's laws regarding non-judicial foreclosure, alleging that the trustee's sale procedure "permits the deprivation of the trustor's property without adequate notice or hearing in violation of the due process guarantees of the Fourteenth Amendment to the United States Constitution and of article I, section 7 of the California Constitution." The California Supreme Court held that non-judicial foreclosure by a lender did not involve significant state action, and therefore was not a deprivation of the foreclosed homeowner's due process rights.

Some title insurance industry members insist that there is a distinction between a lender's non-judicial foreclosure and an HOA's non-judicial foreclosure, because there is direct contractual language authorizing non-judicial foreclosure in the lender-borrower relationship. Their position, therefore, is that an association's non-judicial foreclosure *may* be considered a deprivation of a homeowner's due process rights.

This reading appears to be an unjustified inference, and blatantly disregards that there is often a contractual relationship between the owner and Association which similarly authorizes non-judicial foreclosure. Still, title insurance companies rely on this position when denying title insurance on properties owned by an association after a valid non-judicial foreclosure, gumming up the works when an association is attempting to sell the property. In those instances, it is wise for an association to do some digging and locate a title company that will issue title insurance on the property. Otherwise, the sale to a valid third-party buy may not be possible. ■

Changes to Civil Code Section 4775 Could Impact HOA's Maintenance and Repair Responsibilities

By Jamie Handrick, Esq.

Civil Code Section 4775 discusses the maintenance of common area and exclusive use common area in homeowners associations. Section (a) of 4775 currently states, "unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common area other than exclusive use common area and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest."

Effective January 1, 2017, this Section will be amended as follows:

(a)(1) Except as provided in paragraph (3), unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, and maintaining the common area.

(a)(2) Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for repairing, replacing and maintaining that separate interest.

(a)(3) Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for maintaining the exclusive use common area appurtenant to that separate interest and the association is responsible for repairing and replacing the exclusive use common area.

The significant changes to the law are underlined above. The legislature decided to further define the responsibilities of owners and the association in the event the association's governing documents (i.e., CC&Rs or rules and regulations) do not identify these responsibilities. Until January 1, 2017, the law says if the CC&Rs do not discuss the responsibilities for maintenance of a certain component, owners are responsible for maintaining their separate interest and exclusive use common area.

We also recommend Associations use a Maintenance Matrix that not only has categories for maintenance but also includes categories for repair and replacement.

When the new law becomes effective on January 1, 2017, unless the CC&Rs say otherwise, owners will be responsible for: 1.) repairing, replacing and maintaining their separate interest, 2.) maintaining exclusive use common area. The Association will be responsible for: 1.) repairing, replacing, and maintaining the common area, 2.) repairing and replacing the exclusive use common area.

If the association's CC&Rs do not identify the maintenance, repair and replacement responsibilities of owners and the association for common area and exclusive use common area, the new law broadens the association's responsibilities by requiring Associations to repair and replace exclusive use common area. It is important that the association's CC&Rs are specific about what items owners are responsible for maintaining, repairing and replacing and what items the association is responsible for maintaining, repairing and replacing. It is not enough to simply use the word "maintenance." There is a distinction between "maintaining" something and repairing or replacing something. All of these categories need to be addressed, because if they are not discussed in the CC&Rs then Section 4775 controls.

The key to avoiding confusion and allowing Section 4775 to dictate who is responsible for which components in the community is to make sure the CC&Rs are clear. We also recommend Associations use a Maintenance Matrix that not only has categories for maintenance, but also includes categories for repair and replacement. ■

COYOTES ON THE HORIZON

CONTINUED FROM PAGE 1

Board is the appropriate entity to make that decision.

Since all Owners technically own the common area, any decision to terminate wildlife should be handled by the Board of Directors in the same manner in which the Board might consider termite treatment. Hiring an expert to assist with coyote removal can cost thousands of dollars. Therefore, it is a business decision that should be authorized and vetted. Taking measures into one's own hands, in the absence of Board approval, may lead to liability for the Association and for the individual.

In addition to coyotes, there are several other species of animals that are common within urban settings. Different laws apply to possums, raccoons, and birds, and residents should report problematic animals to the Board for handling.

On a practical note, there are things that residents can do to mitigate the presence of coyotes within CIDs.

RESIDENTS SHOULD CONSIDER THESE TIPS:

- **Trim vegetation to limit habitat**
- **Use motion detecting lights, long range water guns, tennis balls (thrown) to scare away a coyote on the premises**
- **Generally do not encourage coyotes to come onto your property by feeding them**
- **Take in domestic animals at night**
- **Refrain from leaving pet food, human food, or garbage outside and unattended**

Coyotes have a valuable place in the ecosystem, but also make some residents uncomfortable. Boards and managers might consider posting signs warning residents of pupping season, generally in January and February, and of heightened coyote activity. The above list may also be circulated through flyers and literature to spread awareness and to prevent close encounters. Encourage residents to keep their distance and to report coyote sightings. Boards should also use licensed professionals and should deter residents from taking matters into their own hands. Doing so will ensure compliance with State and local laws, and will avoid liability. Ideally, humans and coyotes should find a balance in which both can coexist in a peaceful manner. ■

LIMITS PLACED ON BOARD MEMBER PROTECTION FROM LIABILITY

CONTINUED FROM PAGE 1

the Association was not only overcharged for the new roofs, but that the work fell below the standard of care and required significant repairs.

Sometime later, the Board approved a bid to perform extensive repaving work. The Board elected to finance the repaving with a bank loan. Parth signed the loan documents incurring an additional obligation of $550,000 secured by the Association's accounts receivable and assets. Members were never informed about the loan or approved it as required by the governing documents.

Path claimed that under the Business Judgment rule she was not liable for obtaining a bank loan without membership approval because she did so in good faith and what she believed to be in the best interest of the Association without any conflict of interest. The issue raised in this matter was whether noncompliance with the governing documents falls outside the scope of the protections provided by the Business Judgment Rule. Parth contended that the Business Judgment Rule protects a director who violates the governing documents, as long as the director believes that the actions are in the best interests of the corporation. The Court of Appeal recognized, but did not follow, the holding in another case that the Business Judgment Rule may protect a director who acts in the mistaken, but good faith belief, on behalf of the corporation without obtaining the requisite membership approval.

The Court ultimately held that the case law is clear that director conduct contrary to the governing documents may fall outside the protections provided by the Business Judgment Rule. In other words, a board member who acts on behalf of the Association, but in conflict with the requirements of the governing documents, is most likely not protected from liability. The board member must demonstrate diligence in the performance of their duties which requires that they be familiar with the governing documents. A failure to exercise diligence goes to the issue of whether or not that board member acted in good faith. Unless good faith can be established, the board member is not protected from liability by the Business Judgment Rule. ■

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