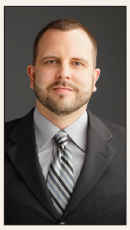
Kriger LAW FIRM News
Fourth Quarter · 2018

New Laws for the New Year



By Tyler Kerns, Esq.

As always, the new year brings with it some new laws. Several of those new laws affect homeowner associations. Discussed below are the most significant changes to the law that took effect on January 1, 2019 affecting homeowner associations.

AB 2912 – Association Finances. The stated legislative intent of Assembly Bill 2912 was to take "initial steps to protect owners in a common interest development from fraudulent activity by those entrusted with the management of the association's finances." There are three primary changes to the law that were brought about by AB 2912.

First, Civil Code Section 5806 was added to require associations to maintain fidelity bond insurance coverage for its directors, officers, and employees in an amount that is equal to or greater than the combined amount of the association's reserves plus the total of three months of assessments. Coverage must be included for computer fraud and funds transfer fraud and, if the association uses a managing agent or management company, coverage must be included for dishonest acts of that person or entity and its employees.

Second, Civil Code Sections 5380(b)(6) and 5502 were added to prohibit transfers from an association's operating or reserve accounts without prior written board approval for any transfers in amounts greater than either $10,000 or 5% of the association's total combined reserve and operating account deposits, whichever is less.

Third, Civil Code Section 5500 was amended to require boards of directors to review on a monthly basis certain financial records that were previously required to be reviewed quarterly and to require that such review include certain additional records that were not previously required to be reviewed. In addition, Civil Code Section 5501 was added to provide a procedure for complying with the monthly review requirement "independent of a board meeting," which will allow boards that meet less frequently than monthly to comply with the new monthly review requirement.

SB 261 – Association Governance. Civil Code Section 4040 previously provided that associations could deliver documents to members by "individual delivery" or "individual notice" by email, facsimile, or other electronic means if the recipient had consented, in writing, to that method of delivery. Senate Bill 261 amended Civil Code Section 4040 to allow homeowners to use email to provide or revoke their consent to receive documents by email, facsimile, or other electronic means. SB 261 also amended Civil Code Section 4360(a) to require that boards provide notice of a proposed rule change at least 28 days before making the rule change. Previously, notice of a proposed rule change was required to be provided at least 30 days before making the rule change.

SB 1016 – Electric Vehicle Charging Stations and Time of Use Meters. Senate Bill 1016 made minor amendments to Civil Code Section 4745, which, among other things, clarify that homeowners are responsible for the costs of installing electric vehicle charging stations, as well as for the costs of the electricity usage associated with the charging stations. SB 1016 also added Civil Code Section 4745.1 regarding "EV-dedicated TOU meters." An EV-dedicated TOU meter is defined as an electric meter supplied and installed by an electric utility that is separate from and in addition to any other electric meter and is devoted exclusively to the charging of electric vehicles and that tracks the time of use (TOU) when charging occurs. Under Section 4745.1, many of the same protections and requirements that apply to electric vehicle charging stations now also apply to EV-dedicated TOU meters.

The attorneys at Kriger Law Firm can assist in providing additional information regarding these new laws. ■

In This Issue:

Michigan Court Finds Smoking Ban Unreasonable as Disability Accommodation

By Steve Banks, Esq.

A U.S. District Court in Michigan recently found an owner's demand for a project-wide smoking ban to be an unreasonable accommodation request. The owner, a breast cancer survivor with asthma and multiple chemical sensitivity disorder, felt her neighbors' smoking increased her cancer risk and aggravated her medical conditions. Her doctor agreed. The HOA installed a system in her unit's ductwork to pull in outside fresh air to address the smoke, and unsuccessfully put a project-wide smoking ban CC&Rs amendment to a vote of the members.

Accordingly, Associations should be diligent in responding to second-hand smoke complaints and should work with all parties concerned to mitigate such conflicts.

The owner sued the HOA and others, claiming violations of the federal Fair Housing Act based on alleged disability discrimination. In granting summary judgment for the Association, the court found the owner's accommodation request was unreasonable. First, since the owner had also complained that cooking odors and other smells had exacerbated her respiratory ailments, she could not show that the smoking ban accommodation would assist her disability. Second, the request was unreasonable since under state law and its own governing documents, the HOA could not legally ban smoking in the absence of its members approving the proposed CC&Rs amendment.

In California, these issues are more complicated. Second-hand smoke problems have traditionally been addressed through the nuisance provisions of an HOA's governing documents, or, in the case of marijuana smoke, through provisions equating violations of the law with violations of the governing documents. However, both medical and recreational use of marijuana is now legal in California. In fact, a rule or CC&R provision that focuses only on marijuana smoking might lead a person with a valid medical marijuana smoking card to claim discrimination based on disability. Accordingly, any prospective ban should be against smoking generally.

Additionally, in California a smoking ban may be implemented through a rule change after compliance with statutory comment and notice procedures, although such a rule would not enjoy the presumption of reasonableness afforded CC&R amendments.

Moreover, an Association faces potential liability if it fails to take steps to mitigate smoking in a unit that impacts another unit. Accordingly, Associations should be diligent in responding to second-hand smoke complaints and should work with all parties concerned to mitigate such conflicts. Where a claim of disability is made, the prompt opening of an interactive dialogue will assist in lowering the Association's potential exposure to a claim of discrimination. As is so often the case, these issues are fact-specific and must be evaluated on a case-by-case basis. ■

What's happening at Kriger LAW FIRM

The firm would like to congratulate Tyler Kerns on becoming a Senior Associate! Tyler joined the firm in April 2018 and quickly became an essential part of the Kriger Team. Tyler oversees the collection department as well as provides general counsel to clients in a wide range of areas, including governing document restatements and amendments, rule enforcements, and association maintenance responsibility issues. He has proven himself to be an integral part of the team, and we are fortunate to have him as a member of the firm.

New Case Law Affecting Enforcement of Restrictions Against Commercial Activity

By Tyler Kerns, Esq.

A California Court of Appeal issued a decision on December 17, 2018 that may affect how associations enforce restrictions in their CC&Rs relating to business and commercial activities. The published decision of *Eith v. Ketelhut* (2018 WL 7048461) involved a vineyard operated on a residential lot in the Los Robles Hills Estates HOA in Thousand Oaks, CA.

The CC&Rs for Los Robles Hills Estates HOA prohibit the use of lots within the development for business and commercial activity. Specifically, the CC&Rs state, "No lot shall be used for any purpose (including any business or commercial activity) other than for the residence of one family…." The CC&Rs further provide that "[f]or good cause shown … deviations from the applicable restrictions " may be allowed "to avoid unnecessary hardships or expense, but no deviation shall be allowed to authorize a business or commercial use." Such provisions prohibiting business or commercial activities can be found in many community association CC&Rs.

The owners of a 1.75-acre lot within the development submitted a landscape plan to the association showing that they intended to plant grape vines on their property. The landscape plan was approved. The owners have since regularly harvested the grapes from their 600 grape vines, transported the grapes to an offsite processing plant where the grapes are crushed and made into wine, and then stored the wine at a separate offsite facility. The owners have produced as many as 1,584 bottles of wine in a single year. The wine is advertised for sale by the owners through social media and a personal website, and the wine appears on the menu of several local restaurants. A local newspaper even featured the owners in a front page article in its "Business" section describing the "commercial" vineyard and providing a link to the owners' website.

Other owners in the association began to complain to the board of directors that the vineyard was a business or commercial use prohibited by the CC&Rs. The board held a hearing and concluded that there was no prohibited business or commercial activity taking place on the property. The board considered the vineyard to be landscaping and concluded that picking the grapes to have them transported offsite for processing into wine did not disrupt the community. Several of the complaining owners then sued the association, several board members, and the owners of the property with the vineyard. The plaintiffs wanted the court to make a determination that the operation of the vineyard was a prohibited business or commercial use and to issue an injunction against such use.

The trial court did not rule on whether the operation of the vineyard was a prohibited business or commercial use of the property. Instead, the trial court relied on the holding in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 to give judicial deference to the board's decision that the operation of the vineyard was not prohibited.

The owners who brought the lawsuit then appealed the trial court's ruling. The appellate court held that the trial court had properly applied the rule of judicial deference adopted by Lamden and, therefore, upheld the trial court's ruling. The appellate court went a step further and concluded that, as a matter of law, the "operation of the vineyard is not prohibited business or commercial activity because it does not affect the community's residential character."

A dissenting judge in the *Eith* case argued that the majority's decision relied on an overly broad interpretation of the *Lamden* rule and also criticized the majority's ruling that a business or commercial activity must affect the residential character of the community in order to be prohibited, even if that standard is not set forth in the CC&Rs. Nevertheless, the apparent new legal standard resulting from the *Eith* case is that a business or commercial activity must affect the residential character of the community in order to be prohibited.

If your association is faced with enforcing a potential violation of its governing documents regarding business or commercial uses, you should consult with legal counsel to determine what affect the recent *Eith* decision may have on your enforcement efforts. ■

Kriger LAW FIRM News

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What's happening at Kriger LAW FIRM

Welcome to our newest citizen,

Auden Ivy Mejia

born to Andre and Stephanie Mejia on December 15 at 5:50 p.m. The bouncing baby girl was 20 inches long and 7 pounds 13 ounces. Congratulations Andre and Stephanie!

Kudos to

Bradley Schuber

for his nomination as one of CAI-SD's Rising Stars!