Kriger LAW FIRM

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News

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AB 1799 May Offer Financial Relief

By Bradley A. Schuber, Esq.

Generally, an association has to conduct an election of directors by secret ballot even if there are fewer candidates than seats available. California *Civil Code Section 5100* provides that absent any other law or provision of an association's governing documents the election of directors *"shall be held"* by secret ballot.

However, Assembly Member Chad Mayes is attempting to revise Section 5100 to create an exception for "uncontested" elections. Assembly Bill 1799, if passed, would amend Section 5100 to relieve associations from having to vote by secret ballot under such circumstances. As currently drafted, an election of directors would be "uncontested" if (1) the number of candidates for election does not exceed the number of directors to be elected at that election and (2) the association declares the election is uncontested.

In order for an association to declare an election "uncontested," it would have to meet certain criteria including, but not limited to, the following: (1) all declared candidates were nominated before the deadline for nominations and in accordance with all lawful provisions of the association's governing documents; (2) the inspector of elections has informed the board that the number of candidates does not exceed the number of directors to be elected at that election; and (3) the board votes in open session to declare the election is uncontested after a hearing during an open board meeting where members are able to make objections to the board making that declaration, and (4) at least 20 days before the board meeting for the vote to declare the election is uncontested, the association provides general notice to all members.

If enacted, AB 1799 would create significant savings for associations. Moreover, associations will avoid having to pay for postage, envelopes, printing costs, a third party election service provider, and sending voting materials multiple times for failing to achieve quorum due to apathy in the community. For larger associations, AB 1799 could potentially save thousands of dollars each year. In short, by exempting "uncontested" elections, associations can avoid the time, energy and cost of conducting an unnecessary election.

If you are interested in learning more about AB 1799 you can visit www.legalinfo.ca.gov. Also, if you are interested in supporting AB 1799, then you should call and/or write your respective state representatives as soon as possible to request that they vote yes on AB 1799. ■

Dealing with Secondhand Smoke

By Joel Kriger, Esq.

As a manager or sitting board member you may be faced with complaints regarding the transmission of secondhand smoke either into a neighboring unit, adjacent exclusive use area patio or balcony, or in Common Areas such as the pool or other recreational facilities. The purpose of this article is to suggest some approaches to dealing with the problems created by secondhand smoke.

Before addressing the problem of secondhand smoke in private condominiums, it is interesting to note the new rules unveiled by the Department of Housing and Urban Development (HUD) in November 2015 that require Public Housing Agencies to develop and institute smoke-free policies in all of their properties. The proposed rule would prevent residents who live in public housing from smoking in and around these properties. The rule is designed by HUD as a means of eliminating the harmful effects of secondhand smoke in government subsidize low income housing. The rule would prevent smoking of all types of lit tobacco products including cigarettes, cigars, and pipes. The rule creates a buffer zone that prevents lit smoking in all living units, indoor common areas, administrative offices, and all outdoor areas within 25 feet of housing.

While we recognize that secondhand smoke may be a nuisance under many governing documents, we do not recommend enacting such a drastic policy for private condominium projects unless the secondhand smoke is so pervasive that the best way to address the problem is to create a smoke-free property.

Our experience with complaints regarding transmission of secondhand smoke are typically not community-wide, but are isolated to a particular unit where the resident is a frequent habitual smoker and the secondhand smoke travels either through the building or from an exclusive use patio or balcony into a neighboring property.

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No End in Sight to Drought Legislation

ASSOCIATIONS MUST CONTINUE WITH THE CURRENT STATUS QUO

By Jamie Handrick, Esq.

In January 2014, California Governor Jerry Brown declared a state of emergency due to the drought in California. In September 2015, emergency legislation was enacted and made part of *Civil Code Section 4735* to address water usage for landscaping within homeowners associations. *Civil Code Section 4735(c)* states:

"Notwithstanding any other provision of this part, an association, except an association that uses recycled water, as defined in Section 13050 of the Water Code, for landscaping irrigation, shall not impose a fine or assessment against an owner of a separate interest for reducing or eliminating the watering of vegetation or lawns during any period for which either of the following have occurred:"

(1) The Governor has declared a state of emergency due to drought pursuant to subdivision (b) of Section 8558 of the Government Code.

(2) A local government has declared a local emergency due to drought pursuant to subdivision (c) of Section 8558 of the Government Code."

Since then, Governor Brown issued an Executive Order mandating a 25% water use reduction by users of urban water supplies in California. On February 2, 2016, based on Governor Brown's November 2015 Executive Order, the State Water Resources Control Board (SWRCB) approved an updated and extended emergency regulation that continued mandatory reductions through October 2016. The February 2, 2016 emergency regulation is no longer in effect, but that does not mean associations are free to fine members who fail to water their landscaping. On May 9, 2016, Governor Brown issued an Executive Order directing the SWRCB to extend the emergency regulations for urban water conservation through the end of January 2017.

A new reporting structure was adopted by the SWRCB on May 18, 2016 requiring water districts to continue to report water use, but their conservation standard will be based on any shortfall in projected supply over three drought years. For example, if an individual water district projects it would, under the specified assumptions, have a 10% shortfall after the next three years at the current rate of use, their mandatory conservation standard would be 10%.

The regulation keeps in place the monthly reporting requirements and specific prohibitions against certain water uses.

Associations should develop creative solutions to provide incentives for owners to maintain the curb appeal of their yards

Most importantly, prohibitions against homeowners associations taking action against owners during a declared drought remain in place.

As directed by Governor Brown in Executive Order B-37-16, the SWRCB will separately take action to make some of these requirements and prohibitions permanent, but whether the prohibition against homeowners associations will become permanent remains to be seen. These new conservation standards are effective now and will remain in effect until the end of January 2017.

What does this mean for homeowners associations? It means associations must continue with the current status quo. Associations cannot penalize owners for failing to water their landscaping during the drought but associations can require owners to remove dead landscaping. Associations should develop creative solutions to provide incentives for owners to maintain the curb appeal of their yards. One idea is to have a fundraiser to raise money that can be used by owners to replace dead landscaping with drought tolerant plants and/or hardscape. Since the funds will be limited, a lottery system can be developed to distribute funds to those owners interested in replacing dead landscaping in their yards.

If, at some point in the future, the Governor and the legislature lift the prohibitions found in the Governor's Executive Orders, Associations will be able to enforce rules requiring owners to submit architectural requests to the Association to replace dirt and/or dead landscaping with drought tolerant plants, artificial turf and/or hardscape. Brace yourselves; this is not something Associations will be able to demand in the near future. ■

Bringing Progress on the HOME Front

BILL LOOKS TO GIVE HOA MEMBERS A TAX BREAK

By Elizabeth Call, Esq.

A bill referred to as the HOME Act ("HOME") was introduced in March of 2016. HOME seeks to implement federal tax deductions for homeowners association assessment payments. If successful, this law will provide a break to middle income earners who live in common interest communities.

HOME was drafted to promote fairness amongst owners living in common interest communities. Monthly assessments often provide essential services and maintenance for homeowners associations akin to those provided by local municipalities such as road paving, trash collection, and park facilities. In theory, monthly dues create a savings for local government and in turn, help keep property taxes low. The HOME Act would provide a financial break, in the form of a Federal tax deduction, to Owners who already pay their respective associations for services.

Under the HOME Act, qualified owners living in common interest communities would have the ability to deduct up to $5,000.00 per year in Federal income taxes. Limitations apply, such as: income (deduction not available for single tax filers who make $115,000.00 per year and joint tax filers who make $150,000.00), vacation residences (the unit must be the filer's primary residence), and only regular assessments are eligible for deductions (probably not special assessments).

When can you expect to see the benefits of the HOME Act? Since this Act will amend the Internal Revenue Code, it must pass the Senate, House, and must be signed into law by the President before becoming a law. The good news is that the bill has bipartisan support so it will not have to toe the party line during an election year, improving its chances of survival. Right now the bill is at the committee level and may endure further revisions for special cases such as private sport clubs that are not open to the public.

BILL CONTEMPLATES MODIFYING INTERNAL REVENUE CODE OF 1986 TO ALLOW A FEDERAL TAX DEDUCTION FOR HOMEOWNERS ASSOCIATION ASSESSMENTS.

For more information, contact the bill's authors: Representative Anna Eshoo (Dem - CA), Representative Mike Thompson (Dem-CA), and Representative Barbara Comstock (Rep - VA). For 2016, plan on taking your normal deductions because the Bill is far from completion. Hopefully, 2017 will bring progress on the HOME front. ■

KLF Spotlight

Two Members of Kriger Law Firm are recognized for their professional achievements

JOEL KRIGER, ESQ.

The Foothills Bar Association, composed of Judges, Attorneys, and others who live or work in East County, recently named firm founder Joel Kriger as the recipient of the George A. Alspaugh Award. The George A. Alspaugh Award commends and recognizes civility in the practice of law and advancement of the positive image of attorneys.

FOOTHILLS BAR ASSOCIATION OF SAN DIEGO COUNTY
Service, Professionalism, Collegiality

ELIZABETH CALL, ESQ.

The San Diego Daily Business Journal named Senior Associate Attorney, Elizabeth Call, as the "Best of the Bar for 2016" for her practice in homeowners association law, litigation, real property, and corporate law. The San Diego Daily Business Journal's "Best of the Bar" award honors local attorneys who were chosen by their peers as the most outstanding in their field.

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SECONDHAND SMOKE

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The quality of life in the neighboring unit can be seriously undermined. It is not only an issue of smell but also there can be adverse health consequences.

In that same community, where one unit is suffering from transmission of secondhand smoke there could be many other residents who smoke yet do not disturb their immediate neighbors at all. Some of the smoking residents may have lived in the property for many years without adversely affecting anyone. A rule prohibiting all smoking would most likely be ignored by the smoking residents and likely would not be enforced if secondhand smoke was not being transmitted from the property.

In a situation where there is an isolated incident of transmission of secondhand smoke, we recommend the board handle complaints on a case-by-case basis. Virtually all governing documents contain a nuisance provision. These provisions prohibit noxious odors and/or smells that unreasonably impact a neighbor's reasonable enjoyment of their property. Based on these provisions, rules can be adopted addressing the problems created by secondhand smoke. The rules can create a procedure for notice and hearing before the board when a complaint of secondhand smoke has been made. The rules would further empower the board to require the offending owner to modify their smoking habits, if possible, to prevent the transmission of secondhand smoke, or completely prohibit that resident from smoking in the unit or in its exclusive use patio or balcony. Violations would result in fines and possible legal action.

In situations where a building or community is plagued with transmission of secondhand smoke, the association can consider more drastic rules creating a smoke-free project along the lines that HUD is requiring for public housing.

With regard to common area facilities, rules creating a smoke-free environment in these areas are completely appropriate and do not significantly impact the rights of the smokers yet protect the other members of the community from exposure to secondhand smoke. ■

AVOID FAMILIAL DISCRIMINATION AT ALL COSTS

By Garrett Wait, Esq.

Associations typically do everything in their power to avoid having to defend lawsuits, but lawsuits can arise even when an association is attempting to avoid liability. One of the surest ways for an association to get sued is to discriminate against a resident based on family status. Most often, these suits are borne out of an attempt to protect the youngest residents at the community that backfires in a big way.

Board of directors often cite concerns about the safety of children in their community when creating rules against behaviors such as riding bicycles, skateboards, scooters, or playing in the common areas. Despite the board's best intentions, these rules unnecessarily restrict the rights of children and can be considered discriminatory under Fair Housing rules.

Rules which specifically target a certain age group, such as a rule limiting the hours children can use certain common area facilities, are considered prima facie discriminatory. Most boards know to avoid these rules given the amount of coverage this type of discrimination has garnered in the recent past. Now, the larger concern is adopting rules which may not appear discriminatory on their face, but have the effect of regulating the behavior of a specific age group.

For instance, we recently came across a rule adopted by an association that stated that tricycles, big wheels, and scooters were banned from being ridden in the common area. No mention was made about children being banned from riding those items in the common area, but this rule still ran afoul of Fair Housing laws because only children would be riding those items in the common area. We immediately recommended that the association adopt new rules that would be more narrowly tailored against dangerous behavior and not discriminatory against children in the community.

When adopting rules, boards should carefully consider whether the rule's actual effect would unnecessarily target children in the community. Fines for familial discrimination are significant and can seriously impact an association's bottom line. Having the association's attorney review questionable rules or even draft all new rules and regulations may be a good idea if the board has concerns about possible Fair Housing litigation. ■

Kriger LAW FIRM NEWS

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