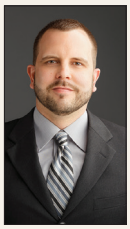
Kriger LAW FIRM News
First Quarter · 2020

Conducting Community Association Meetings During the Coronavirus Crisis



By Tyler Kerns, Esq.

To limit exposure to the coronavirus and to attempt to manage its spread, healthcare professionals and government officials have urged the public to avoid gatherings and, to the extent possible, to stay at home. As a result, countless events have been canceled and many businesses have suspended operations. Community association boards of directors and managers are understandably concerned about how they should be responding to the coronavirus when it comes to, among other things, conducting association meetings. This article attempts to address that concern, but this is still a rapidly developing situation unlike anything encountered before, so our recommendations may evolve over time as circumstances continue to change.

Board meetings

We've been asked how boards should proceed with respect to board meetings in light of the recent guidance to avoid gatherings. Since Civil Code §4910 provides that boards "shall not take action on any item of business outside of a board meeting," board meetings are necessary in order to conduct association business. One solution is found in the Civil Code's definition of a "board meeting," which provides that board meetings can be conducted by teleconference if certain requirements are met. Specifically, Civil Code §4090(b) allows for board meetings to be conducted by teleconference provided that at least a quorum of directors are connected by electronic means through audio or video or both and at least one board member or person designated by the board is physically present at a noticed location where owners may attend and hear and be heard. For associations that do not typically see many (if any) owners showing up to board meetings, this teleconference procedure could be the answer. One board member could show up at the noticed meeting location with a speaker phone, a laptop, or some other device, and the other board members could teleconference in by phone or video conferencing. If any owners show up to attend the meeting, they would need to be able to at least hear all of the directors, and the directors would need to be able to hear any comments made by the owners in open forum.

However, the teleconference meeting procedures required by Civil Code §4090(b), which still requires a physical location where owners can attend the meeting, would not work well at this time for associations where board meetings are well-attended by owners, since we are all being advised to practice "social distancing." Moreover, even small associations and those associations that do not typically see much owner turnout at board meetings should discourage any gathering of owners at this time. This creates a dilemma when trying to comply with the law requiring that board meetings be open to all owners.

The coronavirus has exposed a problem where the law has not caught up with technology. There are conference call services and video conference services that are readily available, simple to use, and some that even offer free services. Just a few examples of videoconferencing services are Zoom, Cisco Webex, and ClickMeeting, but there are other options available as well. Through either conference call services or video conference services, a meeting organizer can distribute call-in or log-in information that can be used by participants to join in remotely. However, unless the teleconference meeting procedures required by Civil Code §4090(b) are adhered to (i.e., at least one director or person designated by the board is physically present at a noticed location where owners may attend), the law does not currently permit a board meeting to be conducted entirely by conference call or by video conference without a physical location where owners may attend.

Nevertheless, given the recommended precautions relating to the coronavirus, during whatever period of time that gatherings remain discouraged, it would seem reasonable to conduct board meetings by conference call or video conference even without providing a physical location for owners to attend as long as the owners are still able to "virtually" attend the meeting. The meeting notice should explain that as a result of the current health situation, the meeting will be conducted in a virtual manner via conference call or video conference, and the meeting notice should provide owners with the information necessary to join the conference call or video conference. This deviates from the statutory requirement that there be a physical location for the owners to attend the meeting but, under the extraordinary circumstances, this may be the most reasonable manner in which to proceed with board meetings while still meeting the spirit of the law by providing owners an opportunity to participate in open forum and also listen to all items of business discussed by the board.

Of course, owners would still need to be excluded from any executive session discussions of the board. Per Civil Code §4925(a), owners are only entitled to attend a teleconference meeting or the portion of a teleconference meeting that is open to the members. Civil Code §4935 specifies the matters that the board may consider in executive session (which are limited to litigation, the formation of contracts with third parties, member discipline, personnel matters, payment plans for delinquent assessments, and decisions to foreclose on an assessment lien).

Membership meetings

There is no similar statutory provision allowing membership meetings, such as the annual meeting of members, to be held via teleconference. Moreover, the annual

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In This Issue:

Some Animals are More Assistive than Others: HUD Issues New Guidelines regarding Disability Accommodation Requests Involving Assistance Animals

By Steven L. Banks, Esq.

It's been almost a decade since the U.S. Department of Housing and Urban Development ("HUD") last issued guidelines regarding assistance animals. Since then, use of assistance animals has increased considerably, as have efforts by some to exploit ambiguities, leading to news stories about emotional support peacocks and kangaroos. In the absence of clear guidance from HUD, HOAs have struggled with issues relating to accommodation requests involving assistive animals, such as the type and amount of documentation that can be required, particularly where a disability or a disability-related need for an animal isn't clear. The issue has been a fertile ground for complaints and lawsuits. In fact, HUD says almost 60% of federal Fair Housing Act ("FHA") complaints concern denial of reasonable accommodations and disability access. Of those, complaints regarding denial of assistance animal requests are among the most commonly received by HUD and are "significantly" increasing.

Fortunately, HUD has recently issued new guidelines for service animals and assistance animals under the FHA, which replace HUD's prior 2013 guidelines. The new guidelines provide more clarity about acceptable assistance animals and about the application process through which requests for their use are reviewed. While the new guidelines do not modify present federal law or regulations, their use is "strongly" encouraged by HUD and will hopefully improve the application process for both applicants and HOAs. The new guidelines are broken into two sections: (1) "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act"; and (2) "Guidance on Documenting an Individual's Need for Assistance Animals in Housing."

The first section primarily sets forth best practices regarding determining if the animal in question qualifies as a "service animal" under federal law or is otherwise a support animal or other type of assistance animal that needs to be accommodated. The guidelines provide an outline of acceptable inquiries of applicants, depending on whether disabilities are readily observable. Details are also provided regarding when and in what manner accommodation requests can be made. Of note is HUD's observation that in its experience, documentation (certificates, registrations, licensing documents, etc.) purchased from internet websites "is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal." The guidelines also differentiate between animals traditionally kept in households and "unique" animals. For approval of the latter, the requestor has the "substantial burden of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal." The guidelines helpfully point out that "reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals."

HUD says almost 60% of federal Fair Housing Act complaints concern denial of reasonable accommodations and disability access.

The second section is intended to help disabled individuals document their need for an assistance animal. This includes helping them explain to their health care professionals the type of information HOAs may need to evaluate their request, particularly when their disability or disability-related need for an accommodation is not readily observable. The section also notes that HOAs cannot require health care professionals to use a specific or notarized form, verify statements under penalty of perjury, or provide a diagnosis or other detailed information about the applicant.

Kriger Law Firm routinely assists its community association clients throughout Southern California on assistance animal issues. We encourage you to review the new HUD guidelines in detail. The new HUD guidelines are available online for download at: https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf ■

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Confidentiality in Pre-Litigation Settlement Agreements

By Garrett Wait, Esq.

A careful reading of Civil Code Section 5215 is instructive for Associations that settle disputes with homeowners, vendors, contractors, builders, and other third-parties prior to litigation. Under Civil Code Section 5215(a): "[T]he association may withhold or redact information from the association records if any of the following are true: … (3) The information is privileged under law. Examples include documents subject to attorney-client privilege or relating to litigation in which the association is or may become involved, and *confidential* settlement agreements."

Critically, the statute specifies that only *confidential* settlement agreements may be withheld from members who make a request for documents under Civil Code Section 5200. If the Association and a third-party come to an agreement to settle a dispute, but do not designate it as confidential – generally through an effective confidentiality clause – then it could be subject to inspection by homeowners under a records request. [Note: Executed contracts are typically considered Association records under Civil Code Section 5200(a)(4)].

This could have significant negative consequences for Associations looking to deal with disputes effectively and discreetly. A non-confidential settlement agreement that gets disclosed to a member as part of a records request could end up forming the basis for different claims against the Association and its directors.

For example, if an Association settles a dispute with a vendor prior to litigation, but that settlement could be perceived as unreasonable, the Association may come under fire from certain members. Aggrieved members may even try to make claims of breach of fiduciary duty against directors depending on the circumstances of settlement. After all, settlement terms read without proper context likely would not appear satisfactory to a member who already has a bone to pick with an Association.

Additionally, Associations involved in the mandatory alternative dispute resolution process prior to litigation would be wise to include confidentiality and non-disclosure language in any agreement reached at mediation. Doing so, especially in disputes with homeowners, could help the Association from being entangled in similar disputes with multiple homeowners.

Of course, in such a scenario, the Association and its directors could be afforded protection under the mediation privilege, the business judgment rule, and ultimately could benefit from judicial deference. Nevertheless, the best practice would be to make any and all settlements with third parties prior to litigation confidential and not subject to records requests under Civil Code Section 5200. That avoids the potential of disclosure of information that may be harmful to the Association.

The statute itself appears to create some measure of built-in protection for settlement agreements made during litigation; however, confidentiality clauses may also be useful when settling those matters. If a records request comes in, the Association's custodian of records could easily look for a confidentiality clause as a sort of sign post and immediately know to withhold that document from the records produced. That could help the Association keep potentially damaging information from being disseminated improperly.

If your Association is in a third-party dispute prior to litigation and wants assistance in crafting confidentiality language, do not hesitate to contact Kriger Law Firm. ■

CONDUCTING COMMUNITY ASSOCIATION MEETINGS DURING THE CORONAVIRUS CRISIS

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meeting typically involves the election of directors, and the election of directors is required to be conducted pursuant to the statutorily-required secret ballot voting process. As part of that process, Civil Code §5120(a) provides, in part: *"All votes shall be counted and tabulated by the inspector or inspectors of elections, or the designee of the inspector of elections, in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes."* Obviously, the requirement that votes must be counted and tabulated in public at an open meeting and that any member may witness the counting and tabulation creates concern in light of the recommended coronavirus precautions.

Under the circumstances, we again believe that it seems reasonable to conduct membership meetings and the opening of ballots via video conference. Notice could be provided to the membership explaining the decision to conduct the meeting by video conference due to the coronavirus guidelines, and the notice would include instructions for participating in the video conference. There would still need to be a designated location at which the inspector of election would open and tabulate ballots, and a management representative and at least one board member should be present at that location as well. The meeting would be conducted as closely as possible to the normal process except that member participation would be by video conference.

Conclusion

Again, there is no statutory basis for conducting board meetings or membership meetings entirely by teleconference or video conference without owners being able to attend in person. However, the coronavirus has resulted in a declared state of emergency and in-person gatherings are being discouraged. Associations need to be able to continue to conduct business, and video conferencing would seem to follow the spirit of the law while limiting personal contact and acting in accordance with instructions issued by the government. It is always possible that an owner could challenge any action taken that does not strictly comply with the letter of the law. However, given the unprecedented circumstances presented by the coronavirus pandemic, we believe that video conferencing is a reasonable solution for the time being.

As always, associations should consult with legal counsel regarding their particular circumstances. ■

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Smoking Ban Not a Reasonable Accommodation

By Joel Kriger, Esq.

In 2004, Phyllis Davis purchased a unit on the second floor of a four-unit building. She was a cancer survivor with a history of asthma and claimed that cigarette smoke from the unit below significantly impacted her ability to breathe comfortably. She requested help from the Association's board of directors. The board made efforts to mitigate the transmission of secondhand smoke but had no power to ban smoking as it was not prohibited in the Association's governing documents.

The efforts by the board to seal openings in cracks, doors and vents to prevent the transmission of smoke along with the installation of an air filter were insufficient to satisfy Ms. Davis. She requested a "reasonable accommodation" in the Association rules to implement a smoking ban in her building. The Association refused to institute a smoking ban based upon its understanding that it had no power to do so as smoking was permitted under the existing rules.

Davis sued the Association alleging that its refusal to ban smoking in her building discriminated against her because of her health issues and was in violation of the federal Fair Housing Act. The court sided with the Association and ruled that implementing a smoking ban would constitute a fundamental change in Association policy versus a moderate adjustment to a policy. This is the test applied when a request for a "reasonable accommodation" is made. Implementation of the smoking ban was considered a fundamental change in policy because of the significant interference with the rights of other smoking residents in the building who relied on the existing rules that allowed smoking in their units at the time of purchase.

It is our opinion that the result in this case (*Davis v. Echo Valley Condominium Association* (2019) 945 F.3d 483) may have been different had the Association rules contained some limitation or power of the board to control the transmission of secondhand smoke. In general, we do not recommend clients impose a complete ban on smoking but instead address the issue of transmission of secondhand smoke by adopting CC&R provisions that empower the board to deal with these issues on a case-by-case basis, including the ability to require the residents of the offending unit to modify smoking behavior or cease smoking in the unit altogether if other alternatives have failed to resolve the problem. ■