THE VOICE
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New Legislation & Case Law

What Every Manager Needs to Be Aware of For 2011

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New Legislation: Requests for Notices of Default (Assembly Bill 2016)

Effective January 1, 2011, this law clarifies that community associations can record a blanket request to be provided with notice of a lender or bank foreclosure upon any of the lots or units located within that association's development. When such a request is recorded, banks or other authorized lenders are required to mail the association notices of default and trustees deeds upon sale for all properties within the association.

What this means for the manager: Every association should affirmatively record this relatively simple notice to permit them to monitor a property as it moves through the foreclosure process and to promptly know when a lender or third party has become responsible for the payment of assessments.

New Legislation: Changes to Civil Code Section 1363.03 (Senate Bill 1330)

Senate Bill 1330 clarifies that any qualifications stated in election rules for candidates and voting must be consistent with a community association's governing documents.

What this means for the manager: In order to alter any undesirable qualifications for voting and elections, the underlying governing documents must be amended.

New Legislation: Automatic External Defibrillators (Senate Bill 127)

Under Health and Safety Code Section 104113, when a "health studio" employee uses an automatic external defibrillator ("AED"), the studio's owners and its agents are not liable for civil damages for claims resulting from such treatment. Senate Bill 127 amends the law to provide that a health studio waives the exemption from liability when the health studio fails to have at least one person trained in the use of AEDs present during business hours when members are permitted access to the facilities. If a health studio is larger than 6,000 square feet, SB 127 requires member be denied access when a trained employee is not present. Unfortunately, SB 127 does not clarify whether it applies to health care facilities located within common interest developments. The existing statute defines a health studio as a facility permitting the use of equipment for physical exercise on a membership basis. While hotel gymnasium facilities are expressly excluded, common interest developments are not.

What this means for the manager: If an association has health care facilities within the development, the association should consider training any on-site staff or volunteer members in the use of automatic external defibrillators.

New Legislation: Governance of Common Interest Developments (Senate Bill 1128)

This law amends Civil Code § 1365.2 to apply the inspection copying provisions to a community service organization or other nonprofit entity that is not itself organized as a common interest development but which provides services to the residents of a common interest development under a declaration of trust. It also amends Section 1368 of the Civil Code to require that a prospective purchaser be provided with a statement describing a rental restriction if one has been adopted by the association.

What this means for the manager: If you manage a community which includes a community service organization be aware that the books and records for that organization are subject to member inspection. If you represent a community association that has a rental restriction, make sure to include a copy of the rental restriction in your governing document disclosure packet for new purchasers.

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New Legislation: Foreclosures: Property Maintenance (Senate Bill 1427)

This bill adds §§ 2929.4 and 2929.45 to the Civil Code, which requires the legal owner of a foreclosed property to maintain that property. Failure to maintain the property could subject the owner to civil fines and penalties of up to $1,000 per day as well as all of the actual and reasonable costs of nuisance abatement undertaken by a governmental entity.

What this means for the manager: If you have a foreclosed property in your community which is not being properly maintained by the bank or other new legal owner, consider enrolling the assistance of local government who now has jurisdiction to clean up the property and charge the costs back to the owner along with civil penalties of $1,000 per day.

New Legislation: Additions to Government Code Section 12955 (Senate Bill 1252)

Senate Bill adds a provision to Government Code § 12955 that states that preferences based on age, which are imposed in connection with a federally approved housing program, do not constitute age discrimination.

What this means for the manager: Nothing. Confirms existing law which holds that age-restricted communities can lawfully discriminate on the basis of age.

Case Law Update: Clear Lake Riviera Community Association v. Cramer, 182 Cal.App.4th 459 (2010).

Clear Lake Riviera Community Association (the "Association") is a common interest development in Lake County. The Association's architectural restrictions included a height restriction for buildings within the development which limited them to 17 feet above street level.

The Cramers, owners of a lot within the development and members of the Association, submitted construction plans to the committee. Mr. Cramer intended on doing the construction himself. Upon review of the plans, the committee placed an approval stamp on each page of the plans and printed "structure height not to exceed 17 feet from control point of lot" (i.e. the center of the sloping lot).

During construction, the committee met with Mr. Cramer to again discuss the height restriction and sent him notices. Despite the warnings and the restriction, the Cramers' home as constructed exceeded the 17 foot restriction by 9 feet, totaling 26 feet in height. After the house was constructed, the Cramers requested a variance, which was denied.

The Cramers were ordered by the trial and appellate courts to remove the home or reduce it to comply with the 17 foot height restriction based upon the following: (1) although the Cramers knew of the restriction, they made no effort to comply with it; (2) two neighbors, who had views of a nearby lake, were completely blocked by the Cramers' home, which led to a diminution of their property values and enjoyment of their homes; (3) permitting the Cramers to violate the restriction would effectively curtail the Association's authority to further enforce the governing documents; and (4) there was no evidence that the cost of correcting the problem was grossly disproportionate to the hardship caused to the Association and its other members.

What this means for the manager: If an owner is violating the architectural restrictions make sure to immediately contact your legal counsel so you can get an injunction in place to cease construction. If the owner continues to build in spite of these admonitions they may be required to remove the nonconforming improvement, regardless of the cost.

Case Law Update: Affan, et. al. v. Portofino Cove Homeowners Association, 2010 WL 426059 (Cal.App.4Dist.), – Cal. Rptr. 3d –.

The Affans owned a condominium at Portofino Cove Homeowners Association. On at least six different occasions, they complained of sewage backup to the property manager for the Association. In response to the Affans and other homeowner complaints of sewage backup, the Association hired a plumber to regularly maintain the drain lines. After the plumbing company conducted a cleaning of the main lines there was a major sewage backup that damaged the Affans' unit. Initially, the Association's manager hired the plumbing company to come back and snake the drains. It then hired a company to come and clean up the spill, extracting waste water, removing and disposing of carpet, baseboards, and drywall, and sanitizing surfaces. The Association indicated that it would take care of the problem, however, it encountered problems with its insurance company. Six months later, no further work had been done to the Affans' unit and it remained uninhabitable. At that time, the Affans filed suit against the Association and its managing agent alleging that the Association had a duty to maintain and repair the sewage lines, and its failure to do so resulted in the sewage eruption that dam-

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aged their unit. The Affans also alleged that the Association and its managing agent failed to promptly repair and remediate the problem. The trial court, applying the judicial deference rule in Lamden, ruled in favor of the Association. On appeal, the court considered whether the trial court erred in applying the Lamden rule.

The court interpreted the Lamden rule narrowly as "a rule of deference to the reasoned decision-making of homeowners association boards concerning ordinary maintenance." The court then stated that the Lamden rule did not create "blanket immunity for all the decisions and actions of a homeowners association." After reviewing the record, the court determined that there was no evidence that the Association's non-maintenance of the sewage lines was a result of a good faith decision based upon reasonable investigation. Accordingly, the court ruled in favor of the Affans.

What this means for the manager: Make sure to document in writing the efforts that the board is taking in good faith and upon reasonable inquiry to correct a maintenance problem to ensure that the board can take advantage of the business judgment rule in any ensuing litigation.

Case Law Update: Alga Hills Homeowners Association v. Gallagher, 2010 WL 2933578 (Cal.App.4 Dist.) [Unpublished Decision].

Alga Hills Homeowners Association is the association that governs the Alga Hills common interest development. The Board of Directors for the Association determined that it would be in the best interests of the Association to restate the current declaration. After soliciting membership vote, the Association did not have the requisite 75% of affirmative votes required by the declaration for amendment. Thus, the Association petitioned the trial court pursuant to California Civil Code Section 1356 to reduce the number of affirmative votes required for approval. An Association member opposed the petition. Ruling in favor of the Association, the court found that notice was properly given, the election was properly held, reasonable efforts were made to permit eligible members to vote, more than 50% of the owners approved the amendment, and the amendment was reasonable.

What this means for the manager: This case verifies that an association can petition a court to reduce a supermajority voting requirement to a majority of the members in accordance with Civil Code section 1356.

Case Law Update: Harrison, et. al. v. Sierra Dawn Estates Homeowners Association, Inc., 2010 WL 25436168 (Cal.App.4 Dist.) [Unpublished Decision].

Sierra Dawn Estates Homeowners Association adopted a rental restriction that included the following provisions: (1) the new owner of a unit cannot rent out his or her unit for at least one year after acquiring the unit; (2) the maximum term of a lease is one year; (3) leased units cannot exceed 20% of the total units; and (4) no owner can lease more than 3 of his or her units.

The court upheld these restrictions and found that there was ample evidence to support the reasons for the Association's adoption of the restriction. First, there was evidence to support that rental units were generally correlated with crime. Second, renters tended to violate rules more often than owners. Finally, renters were less likely to volunteer in the community or contribute to it. Based on the evidence produced, the court affirmed the validity of the rental restriction.

What this means for the manager: While this case is unpublished and therefore not binding authority, it is the first known appellate case which upholds the validity of rental restrictions.

Case Law Update: Worldmark v. Wyndham Resort Development Corporation, – Cal. Rptr. 3d – (2010), 2010 WL 3312607 (Cal.App.3 Dist.).

Worldmark is a California nonprofit mutual benefit corporation with more than 260,000 members and owns vacation time share resorts. One of Worldmark's members requested Worldmark distribute his petition to amend the corporation's bylaws. When Worldmark refused, the member demanded to inspect the membership records of the corporation to obtain member email addresses so that he could distribute his petition. Worldmark denied the member's request and suggested the member use a third party to distribute, by first-class mail, the member's petition.

Corporations Code Section 8330 provides that a member of a mutual benefit corporation has the right to inspect and copy the record of members' names, addresses, and voting rights. The court determined that a member's address pursuant to Corporations Code Section 8330 included a member's email address. The court further concluded that the alternative to mail the petition by first-class mail was not reasonable given the total number of members and the costs that would have been incurred.

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What this means for the manager: Associations should affirmatively notify members as part of their annual disclosures of the right to opt out of the sharing of their name and mailing and email addresses on any membership list maintained by the association which subject to member inspection under Civil Code section 1365.2 and Corporations Code section 8330.

Jennifer Jacobsen and the members of her firm, Baydaline & Jacobsen, proudly serve as general corporate counsel to over 800 community associations in California and Nevada. Ms. Jacobsen assists boards of directors with the day-to-day operations of a community association including providing orientation and training, enforcing and revising governing documents, and transitioning from developer to member control. Ms. Jacobsen can be reached at (916) 669-3500 or at jjacobsen@bayjaclaw.com