NEW LEGISLATION FOR 2016 & CASE LAW REVIEW FROM 2015

PRESENTED BY

FIORE RACOBS & POWERS

A PROFESSIONAL LAW CORPORATION

NEW LEGISLATION

I. Davis-Stirling Common Interest Development Act Changes

A. Assembly Bill 349 – Gonzalez - Artificial Turf

AB 349 amends Civil Code Section 4735.

This Bill was enacted as urgency legislation, and became effective on September 4, 2015.

It makes void and unenforceable any provision in the association's governing documents that prohibits, or includes conditions that have the effect of prohibiting, the use of artificial turf or any other synthetic surface that resembles grass.

An association cannot require homeowners to reverse or remove the water-efficient landscaping measures which were installed in response to a declaration of a state of drought emergency by the Governor.

B. Assembly Bill 786 – Levine - Water

AB 786 amends Civil Code Section 4735.

This Bill was enacted as urgency legislation, and became effective on October 11, 2015. It is intended to clarify the intent of Section 4735. The language of Section 4735 previously provided that an association could not fine an owner for reducing or eliminating watering of landscape during any state of drought emergency declared by the Governor, "except for an association that uses recycled water…for landscaping irrigation."

The Legislature did not intend to allow associations that used recycled water to fine owners. It also did not intend to exempt owners who had access to use recycled water through their associations from being fined if they didn't maintain their landscape.

The new current language will provide that an association can fine an owner who receives recycled water and fails to use that water for landscaping irrigation.

C. Assembly Bill 596 – Daly – FHA/VA Reporting of Project Approval

AB 596 amends Civil Code Section 5300 as of July 1, 2016, to require the annual budget report of a condominium project to include a separate statement describing the status of the common interest development as a Federal Housing Administration (FHA) approved condominium project and the status of a federal Department of Veterans Affairs (VA) approved condominium project.

These statements are to be on two separate pieces of paper in 10 point font in the following form:

"Certification by the Federal Housing Administration may provide benefits to members of an association, including an improvement in an owner's ability to refinance a mortgage or obtain secondary financing and an increase in the pool of potential buyers of the separate interest."

"The common interest development [is/is not (circle one)] a condominium project. The association of this common interest development [is/is not (circle one)] certified by the Federal Housing Administration."

"Certification by the federal Department of Veterans Affairs may provide benefits to members of an association, including an improvement in an owner's ability to refinance a mortgage or obtain secondary financing and an increase in the pool of potential buyers of the separate interest."

"The common interest development [is/is not (circle one)] a condominium project. The association of this common interest development [is/is not (circle one)] certified by the federal Department of Veterans Affairs."

This new section becomes operative July 1, 2016.

Certification of projects can be checked on FHA Website and VA Website at:

FHA
https://entp.hud.gov/idapp/html/condlook.cfm

VA
https://vip.vba.va.gov/portal/VBAH/VBAHome/condo pudsearch

D. Assembly Bill 1448 – Lopez - Clotheslines

AB 1448 adds Civil Code Section 4750.10 regarding clotheslines.

A "clothesline" will include a rope, cord, or wire from which laundered items may be hung to dry or air.

A balcony, railing, awning, of other part of a structure or a building shall not qualify as a clothesline.

A "drying rack" means an apparatus from which laundered items may be hung to dry or air.

A balcony, railing, awning, of other part of a structure or a building shall not qualify as a drying rack.

A provision of a governing document is void and unenforceable if it effectively prohibits or unreasonably restricts an owner's ability to use a clothesline or drying rack in the owner's backyard.

An association may impose reasonable restrictions on an owner's backyard for the use of a clothesline or drying rack.

"Reasonable restrictions" are those that do not significantly increase the cost of using a clothesline or drying rack.

This new section applies only to backyards that are designated for the exclusive use of the owner.

The intent of the new section is to save energy, but it is not intended to prohibit an association from establishing and enforcing reasonable rules governing clotheslines or drying racks.

E. Assembly Bill 1516 – Assembly Committee on Housing and Community Development - Omnibus Bill making nonsubstantive changes

AB 1516 makes changes to the Davis-Stirling Common Interest Development Act, Assessment and Reserve Funding Disclosure Summary Form, Civil Code Section 5570, paragraph 7, by changing the words "funding" to "funded."

F. Assembly Bill 731 – Gallagher – Maintenance of the Codes – Omnibus Bill making nonsubstantive changes

AB 731 amends Civil Code Section 5910 to add two commas to the first sentence of that Section.

AB 731 also amends Section 5915(b)(2) to change the word "may" to "shall" – so the sentence will now read the "association **shall** not refuse a request to meet and confer."

II. Changes To Other Laws

A. Senate Bill 600 – Pan – Unruh Civil Rights Act

SB 600 amends Unruh Civil Rights Act, Civil Code Section 51, to extend the protections of the Act to persons regardless of citizenship, primary language, or immigration status. The Bill also made it clear that nothing in this Bill was to be construed to require the provision of services or documents in a language other than English, beyond that which is already required by other provisions in federal, state, or local law.

B. Assembly Bill 1164 – Gatto – Water Conservation

AB 1164 adds Government Code Section 53087.7 to provide that no city or county may enact an ordinance or regulation, or enforce any existing ordinance or regulation, which prohibits the installation of drought tolerant landscaping, synthetic grass or artificial turf on residential property.

This Bill was adopted for the same reasons as AB 349, which prohibits associations from prohibiting artificial turf, but applies to cities and counties rather than associations.

This statute establishes a statewide policy favoring drought tolerant landscaping and artificial turf.

Urgency Legislation – Took effect October 9, 2015.

C. Senate Bill 655 – Mitchell – Housing Standards – Mold

SB 655 amends certain sections of the Health and Safety Code and adopts a new Section 1941.7 of the Civil Code regarding mold and substandard buildings, and relates to landlords not associations.

Civil Code Section 1941.7 provides that a landlord does not have to "repair a dilapidation relating to the presence of mold" until it has notice of this dilapidation. The landlord is also excused from that duty if the tenant is in violation of the tenant's duties to keep the premises he occupies clean, sanitary, etc., per Civil Code Section 1941.2.

One Health and Safety Code amendment defines mold as "microscopic organisms or fungi that can grow in damp conditions in the interior of a building." [Health & Safety Code §17920(j).]

Health and Safety Code Section 17920.3(a) is amended to add "(13) Visible mold growth, as determined by a health officer or code enforcement officer . . ." constitutes inadequate sanitation, unless the presence of mold "is minor and found on surfaces that can accumulate moisture as part of their properly functioning and intended use." A landlord's violation of that statute is a misdemeanor.

This Bill was not intended by its author to apply to associations. But since mold may occur in common areas and since associations are not exempt under these provisions, there is some concern that this law may be applied to associations.

D. Senate Bill 351 – Committee on Banking and Financial Institutions – Corporations Code Amendments

SB 351 makes changes to Corporations Codes Sections 5039.5, 5213, and 7213 to provide that the corporation shall have a "chairperson of the board" who may be given the title of chair, chairperson, chairman, chairwoman, chair of the board, chairperson of the board, chairman of the board or chairwoman of the board.

E. Assembly Bill 856 (Calderon) – Drones

AB 856, effective January 1, 2016, amends Civil Code Section 1708.8. Under existing law a person is liable for physical invasion of privacy when that person knowingly enters onto the land of another person without permission or otherwise trespasses to capture any type of visual image, sound recording, or other physical impression of a person engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. Also under existing law, a person is liable for constructive invasion of privacy for these activities through the use of any device, regardless of whether there is a physical trespass. Existing law subjects a person who commits physical or constructive invasion of privacy to specified damages and civil fines.

AB 856 would expand liability for physical invasion of privacy to also include a person who is knowingly entering into the airspace above the land of another person without permission, as provided.

By providing that a person also commits a physical invasion of privacy by entering into the air space above the land of another to photograph or record private events. AB 856 does not give associations more or less authority to control drones, but it does establish a public policy to control the use of drones in some circumstances.

The FAA regulates the commercial use of drones, and has now made clear that it will regulate recreational use, as well. Regulations control when, where, and how a drone may be operated. The FAA is also considering requiring that all drones be registered.

III. Bills That Did Not Pass

A. Assembly Bill 1335 – Atkins – Building Homes and Jobs Act

AB 1335 would have enacted the Building Homes and Jobs Act to establish permanent and ongoing sources of funding dedicated to affordable housing development.

It would have imposed a $75 surcharge on all documents recorded with a county recorder.

CLAC opposed the Bill.

Bill did not make it out of Assembly.

IV. Reminders

A. Section 4775 – Maintain, repair and replace

Effective January 1, **2017**, the Davis-Stirling Common Interest Development Act ("Davis-Stirling" or "Act") changes the legal presumption for "exclusive use common area" maintenance, repair and replacement. Civil Code Section 4775 will provide that the owner is responsible for "**maintaining**" his/her exclusive use common area and the Association is responsible for "**repairing and replacing**" the exclusive use common area **unless the CC&Rs provide otherwise**.

The Act does not change the presumption as to who is responsible for maintaining, repairing and replacing common area (the association) or for maintaining, repairing and replacing separate-interest property (the owner of each separate interest).

But, beginning in 2017, there will be an important distinction regarding exclusive use common area maintenance, repair and replacement. The owner of the appurtenant separate interest will "**maintain**" the exclusive use common area and the association will be responsible for **repair and replacement** unless the CC&Rs provide otherwise.

The difference between maintaining and repairing an exclusive use common area component is not clear or defined in the new Code Section. For example, Black's Law Dictionary defines "maintain" as to "care for (property) . . . to engage in general repair and upkeep." (8th ed. 2009, at p. 1039) If the duty to maintain requires "general repair," confusion will result regarding where a homeowner's duty to maintain ends and an association's duty to repair begins.

Associations with exclusive use common area will need to investigate and evaluate the potential impact of this statutory change well before the January 1, 2017, effective date for this change in the law. Depending on the circumstances, both as to the existing association governing documents, and the physical components of the project, associations may need to consider:

- A CC&R amendment, e.g., to overcome the statutory presumption and to make repair and replacement of exclusive use common area the obligation of the owner of the appurtenant separate interest.

- Adding exclusive use common areas to the association's reserve study for repair and replacement.

- Proposing a special assessment or implementing regular assessment increases to fund reserves for repair and replacement of exclusive use common areas.

- Adopting rule changes to define maintenance obligations applicable to various exclusive use common area components.

Depending on the age of a community, the existence and nature of exclusive use common area improvements, as well as the association's financial resources, the changes to Civil Code Section 4775 could have a significant impact, especially for an association which has not planned for this change in the law in advance of 2017.

B. **Pool Regulations** - Title 22 of the California Code of Regulations was amended regarding requirements for swimming pools, and spas, effective January 1, 2015. This included several changes to the Regulations, such as water clarity requirements, signage, etc.

V. Federal Legislation

A. HR 1301 (Kinzinger – R. IL – Introduced 3/4/2015) and SR 1685 (Wicker – R. – MS Introduced 6/25/2015) – HAM Radio

Two federal Bills were introduced in 2015 regarding the **Amateur Radio Parity Act of 2015.**

Both Bills have identical language and would direct the Federal Communications Commission (FCC) to amend regulations concerning the height and dimensions of station antenna structures to prohibit a private land use restriction from applying to amateur service communications if the restriction precludes such communications, fails to accommodate such communications, or does not constitute the minimum practicable restriction to accomplish the legitimate purpose of the private entity seeking to enforce the restriction.

These Bills would have the effect of requiring associations to allow HAM radio operators and antennas in the association. The legislative intent behind these Bills is as follows:

(1) More than 700,000 radio amateurs in the United States are licensed by the Federal Communications Commission in the amateur radio service.

(2) Amateur radio, at no cost to taxpayers, provides a fertile ground for technical self-training in modern telecommunications, electronics technology, and emergency communications techniques and protocols.

(3) There is a strong Federal interest in the effective performance of amateur radio stations established at the residences of licensees. Such stations have been shown to be frequently and increasingly precluded by unreasonable private land use restrictions, including restrictive covenants.

VI. Legislative Trends and concerns

A. Drought Continues

1. Prohibitions or limits on construction of new pools, spas, jacuzzis, etc. – some cities are lifting these moratoriums based on pressure from pool contractors and homeowners.

2. Restrictions on emptying and filling pools – Cities, counties and water district ordinances may limit the number of times per year and number of gallons.

B. Hazardous substance use

1. Cleaners, solvents, and pesticide restrictions will be increased

C. Clean renewable energy

1. Increased legislation at the federal, state and local levels regarding solar, wind, and other sources of energy

CASE LAW 2015

A. Watts v. Oak Shores Community Association (2015) 235 Cal.App4th 466

* Certified for partial publication re: reasonableness of annual fee for short term renters.

Association has 660 developed lots. Approximately 20% occupied full time (125-150). Approximately 66 absentee owners rent to short term/vacation renters.

Three owners challenged rules adopted by the Association which provided for an annual fee of $325 to be imposed on only those owners who rent their homes

Association complied with the CC&Rs in imposing fees for costs associated with short term rentals. Association did not violate the statute prohibiting assessments exceeding the amount necessary to defray costs for which they are levied. Association had the authority to establish rules, and to create different rules for short term renters.

B. Tract 19051 Homeowners Association v. Kemp (2015) 60 Cal. 4th 1135

Defendant Kemp bought a lot within Tract 19051, and proceeded to demolish most of the existing one-story residence to build a larger two-story home. Kemp's neighbors objected to the project, claiming it violated restrictions contained in a declaration recorded in 1958. However, the declaration had already expired by its own terms years before.

Tract 19051 homeowners had attempted to extend the declaration, the trial court found that because Tract 19051 did not qualify as a common interest development within the meaning of the Davis-Stirling Common Interest Development Ac (Act), the attempt to extend the declaration was unsuccessful.

The trial court held in favor of the defendant Kemp and awarded him attorney fees under Civil Code Section 5975(c).

The Court of Appeals reversed the award of attorney fees, holding that because the Act was found to be inapplicable, the attorney fees provision in the Act could not apply to award Kemp attorneys' fees.

The California Supreme Court reversed, holding that the award of attorney fees was supported by the language of section 5975(c) and by the legislative intent underlying the statute.

The Court reasoned that because the lawsuit was initiated as an action to enforce the governing documents of a common interest development, and because the defendant was the prevailing party, he was just as entitled to an award of attorney fees as the plaintiff would have been if the plaintiff had prevailed. To hold otherwise would defeat the reciprocal nature intended for Civil Code Section 5975(c).

Here, the *defendant* was the prevailing party in an action by the Association to enforce governing documents. Therefore, the defendant was entitled to the attorney fees provided for in that Act precisely *because* no common interest development existed.

C. Ryland Mews Homeowners Association v. Munoz (2015) 234 Cal. App. 4th 705

Upstairs owner took out carpet and installed hard surface flooring without Association approval. Downstairs owner complained. Upstairs owner then claimed they had to remove the carpet because of severe allergies. Association sued and claimed noise was a nuisance under the CC&Rs.

Trial Court granted Association request for mandatory preliminary injunction requiring upstairs owner to cover 80% of total floor area with throw rugs or other material to dampen sound transmission. Owner was also required to submit application to modify existing flooring to comply with Association's guidelines.

Court of Appeal affirmed trial court decision and found the decision was a compromise that "balanced the considerations of everyone involved."

D. Dorsey v. Superior Court – (2015) 241 Cal.App. 4th 583

Tenant Crosier and Landlord/Owner of Condo Unit Dorsey enter into a one year lease for a condo unit in October 2012. There was an attorneys' fees provision in the lease that provided that "In any action or proceeding arising out of this Agreement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorneys' fees and costs."

After the lease ended, the tenant Crosier filed a claim in small claims court against the landlord Dorsey for $10,000 for breach of the lease, retention of the security deposit, constructive eviction, etc. and also sought an additional $850 for reasonable attorneys' fees. Dorsey filed a cross complaint for holdover rent, and other damages. Dorsey sought attorneys' fees of $2000.

Small claims court entered judgment for Crosier for $3200 and for Dorsey for $1,153. (e.g. net judgment for Crosier of $2047.

Dorsey filed an appeal to the Appellate Division of the Superior Court. Both sides were represented by lawyers at the appeal.

Appellate Division found: 1) Dorsey breached lease by not returning Crosier's $1560 security deposit and 2) Crosier did not breach the lease.

Crosier's attorney filed a motion for $11,497.50 in attorney's fees under the attorney's fees provision of the lease. Dorsey filed an opposition to the motion, alleging that the $150 cap in CCP Section 116.780(c) on attorneys' fees in appeals trumped the contract provision.

Appellate Division ultimately awarded Crosier $10,447.50 in fees.

Dorsey filed a petition for writ of mandate to the Court of Appeal.

Court of Appeal reviewed legislative intent and all cases on the $150 cap on attorney's fees on appeal.

Court of Appeal concluded that 116.780(c) is intended to make the $150 fee the maximum award of attorney's fees on appeal and supersedes other fee entitlement statutes. Courts may now be enforcing the $150 cap on attorneys' fees in a small claims court appeal. Associations which are defendants in small claims court may wish to consider filing a complaint in Superior Court and remove the small claims case to that venue.

E. <u>Hanson v. JQD, LLC</u> (N.D. Cal.) 2014 WL 644469; 2014 WL 3404945

Federal lawsuit brought against JQD, LLC, dba Pro Solutions, a "no-cost" assessment collection service in the Bay Area. Court granted in part, and denied, motions to strike brought by the defense. In denying the motions to strike, the Court found that the plaintiff stated a cause of action for violation of the Fair Debt Collection Practices Act, and Bus. & Prof. Code § 17200. Plaintiff based her claims on alleged violations of the Davis-Stirling Act.

The federal Court found that California courts would probably determine that the "no-cost" model violates Civil Code section 5650. An Association is entitled to recover the reasonable costs of collection, but associations incur no cost by hiring Pro Solutions. *Brown v. Professional Community Management* (2005) 127 Cal. App. 4th 532 and *Berryman v. Merit Property Management, Inc*. (2007) 152 Cal. App. 4th 1544 are distinguishable. In those cases, the fees in question were actually incurred and paid. Here,

according to the pleadings, the Association was never obligated to pay fees to Pro Solutions, because Pro Solutions always collected the fees directly from the homeowner.

Based on the court docket, it appears the case will settle shortly, and there will not be a final determination on the merits.

F. <u>Browning-Ferris Industries and Local 350, Int'l Brotherhood of Teamsters</u> (August 27, 2015) NLRB Case No. 32-RC-109684

Browning-Ferris contracts with Leadpoint to provide workers to staff its Newby Island Recycling facility in Milpitas.

Is Browning-Ferris a joint employer of those workers, such that it must participate in collective bargaining? Yes, based on common law rules.

The two employers share matters governing the essential terms and conditions of employment. It is enough that a joint employer possesses the authority to control the terms and conditions of employment, even if that employer does not exercise that authority. Moreover, the joint employer's control need not be exercised directly and immediately; it may be exercised indirectly.

Association managers have expressed concern that this ruling could increase their exposure to liability for the acts of Association vendors, and for those vendors' employment conditions.