ANDERSON & KRIGER
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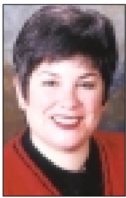
A&K News
First Quarter Newsletter, 2005
Joel M. Kriger, APC - Community Association Division

Severe Depression Reason Enough!

Terrier Companion Allowed Despite No-Dogs Provision

BY LAURI CROCE, ESQ.



Last year the California Court of Appeal published its opinion in *Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission* (2004) 121 Cal. App. 4th 1578, and the California Supreme Court allowed the decision to stand. Jayne and Abdelfatah "Ed" Elebiari sought permission from the Association to keep a small dog, even though the Association's CC&Rs contained a "no dogs" provision.

Disallowing Small Dog for Severe Depression Violates California FEHA

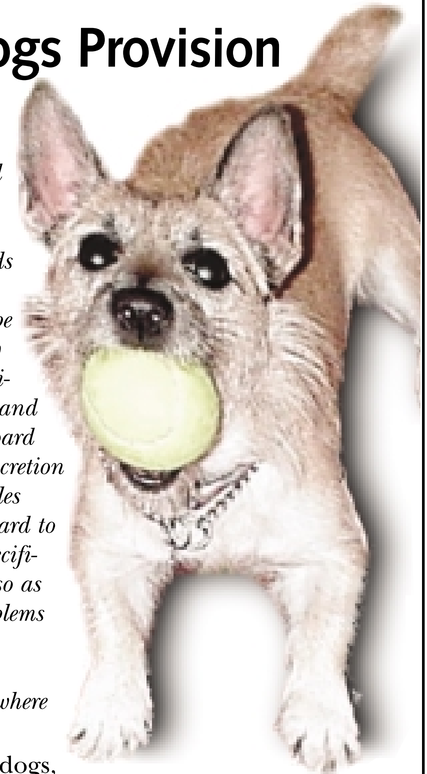
The Elebiaris suffer from severe depression and found that the dog alleviated their symptoms and enabled them to function more productively. The Association refused their request, leading the Elebiaris to file a claim with the California Fair Employment and Housing Commission (the FEHC or the Commission), which found in favor of the Elebiaris. Auburn Woods then filed a petition for administrative writ of mandate to overturn the FEHC decision, and the trial court granted the requested relief. The Elebiaris and the FEHC appealed the trial court's Judgment, requesting that the original decision of the FEHC be reinstated. The Court of Appeal agreed with the appellants and decided that not allowing a couple living in a condominium development to keep a small dog that alleviated their symptoms of severe depression violated the California Fair Employment and Housing Act.

The Court of Appeal held that depression can meet the definition of disability and, under the right circumstances, allowing a companion dog can constitute a reasonable accommodation despite a no-dogs policy. In this case, the Elebiaris were able to present compelling evidence that their disabilities limited their use and enjoyment of their condominium — keeping a companion dog improved that situation.

Plea for Reasonable Accommodations Supported by Doctors' Request

Ed Elebiari was involved in a serious car accident in 1991 and suffered brain damage that required three surgeries. He is hydrocephalic, has a seizure disorder, has severe headaches, and suffers from depression. Ed's wife, Jayne, also suffered from depression, with serious recurrent episodes lasting from nine months to one year.

In 1998, the Elebiaris bought a condominium at Auburn Woods. Section 6.17 of the CC&Rs provides that…



"No reptiles or animals shall be permitted in the Condominium Units or on the property except that pet birds and domestic house cats (limit of 2) shall be allowed so long as they do not constitute a nuisance to the neighbors and other residents. The Board of Directors has the discretion to adopt reasonable rules and regulations in regard to the keeping of these specifically enumerated pets so as to avoid nuisance problems or health and safety hazards. No dogs are allowed to be kept anywhere in the development."

Despite this ban on dogs, in April 1999, the Elebiaris brought home a small terrier named Pooky. The Association requested the dog's removal, and in response, the Elebiaris submitted letters by themselves and their doctors requesting a reasonable accommodation to their impairment by waiving the prohibition against dogs. They explained that the Elebiaris were improved with the companion pet and deteriorated when the dog was removed. The Elebiaris also promised that if allowed to keep the dog, they would "immediately dispose of any solid waste products produced [by] the dog; keep all barking to an absolute minimum at all times; and the dog will wear a lead at all times if she's within the common condo areas. Furthermore, she will not be allow[ed] in the laundry-room, pool area, or places where residents congregate."

Association Refuses to Accommodate

Despite the Elebiaris' repeatedly making their needs known to the Association, offering to provide medical evidence to support their claims, and hiring advocates and attorneys to press their position, the Association refused to make the accommodation. The FEHC characterized the Association's lengthy delay in finally offering to accommodate as a refusal, which characterization the Court of Appeal upheld. The Court of Appeal held that if the

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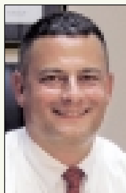
"Meet and Confer"

Complying with the New Internal Dispute Resolution Law

BY KENNETH H. DILLINGHAM, JR.



While the new legislation effective this year may seem overwhelming (as many of you have said to us!), by far the most difficult one is the new requirements with regard to disputes within your communities. First, let's recap the new requirements, and offer suggestions on how you and your communities may implement a workable policy.

Frequent readers should know of these new requirements. Civil Code 1363.810 et. seq., added by Assembly Bill 1836, imposes new dispute resolution requirements on common interest subdivisions. Any disputes within the community involving the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation law, or the community's governing documents (CC&Rs, bylaws, rules, etc.) are subject to these new requirements.

These new requirements add another layer of rules dealing with disputes and violations in community associations. These new rules do not replace any existing procedure (for example, your notice/hearing/fine procedures, or any external dispute resolution like mediation or arbitration). They add another layer of internal dispute resolution procedures.

Associations and boards must now provide "...a fair, reasonable, and expeditious procedure..." for resolving disputes in their communities. If you adopt a new procedure, it must be adopted by the association following the new rule adoption procedures from last year (30-day prior notice to owners, owners have veto rights). It must include the following minimum requirements:

- Either party may invoke the procedure.
- Such notice shall be in writing.
- There must be prompt deadlines, with a maximum time for the association to act.
- Associations must participate if an owner invokes the procedure.
- Owners may participate, but are not required to.
- Both parties must have the means by which they may explain their positions.
- Owners have the right to appeal any decision directly to the board.
- Any solution (resolution or agreement) that is not in conflict with law or the governing documents binds the parties, and may be judicially enforced.
- Owners may not be charged any fee to participate in the process.

If you do not adopt a new procedure, there is a "default" statutory procedure in Civil Code §1363.840. While the default procedure includes the above requirements, it has several potential problems that could adversely affect communities. Thus, we have the following suggestions for you:

1. **Adopt your own procedure.** While you could use the default procedure, you may wish to consider adopting your own procedure. Remember that it needs to be "expeditious," or quick. It also must be fair. By adopting your own procedure, you will be able to craft something that you can work with on your schedule.
2. **Set parameters for resolutions.** In your own procedure, you have the ability to set parameters within which the board-designee or committee may work within to resolve the dispute. By setting parameters you can mitigate or minimize the potential solution that is not acceptable to the community as crafted by either the designee or committee.
3. **Consider personal safety issues.** While the law does not require you to meet with the owner at his or her home, there are situations where the dispute is heated. In such a situation, a "mutually convenient" place does not need to be at the owners' residence.
4. **Consider whether the entire board needs to participate.** Several people have expressed concerns about having one or two people (the designee or committee meeting

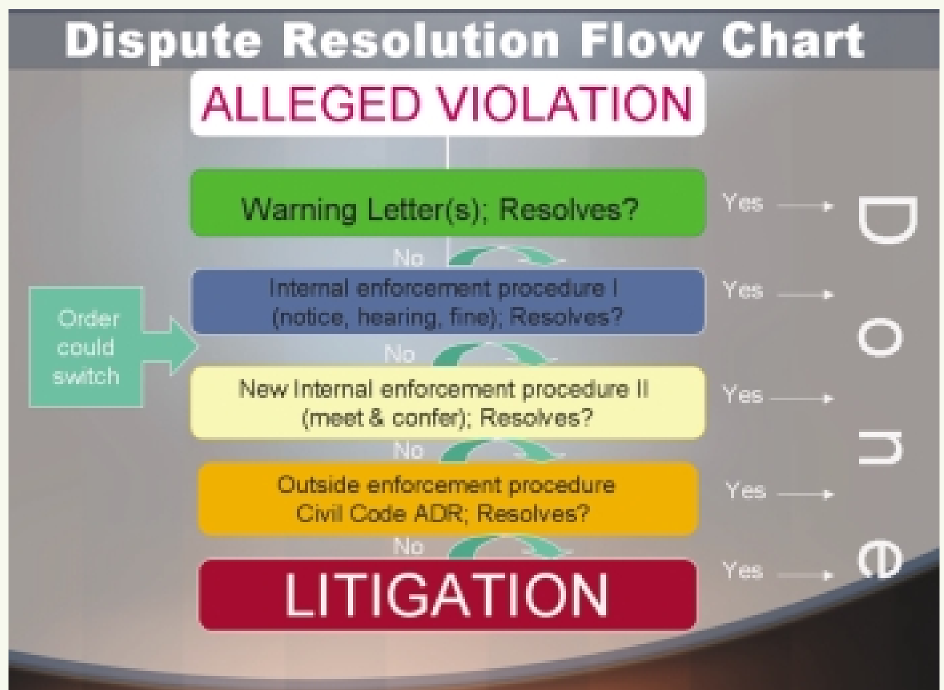


CHART CREATED BY PATEE BARTA AND KEN DILLINGHAM

with the owner) deciding or crafting an agreement or resolution that the entire board does not agree with. If this is a concern, you may wish to consider whether the designee or committee needs prior board approval before signing an agreement or resolution. While not specifically prohibited by the statute, if such a procedure causes an undue delay, it may not be considered "expeditious" as required by the statute.

5. **Consider Signatures.** You may wish to consider whether the designee or committee can enter into an agreement with the owner during the "Meet and Confer" process. This would involve obtaining a signature or initial of the owner at the time. However, beware that such a signed agreement may be binding on the association, regardless of the terms of the agreement. Alternatively, the owners' initials on a handwritten memorandum may help in the accuracy of drafting the final agreement.
6. **Remember to include an appeal right.** The minimum requirements of an individually-adopted procedure must include the ability of an owner to appeal directly to the entire board. Any procedure you adopt must include this right.
7. **Owners may not be charged a fee.** Remember that owners may not be charged a fee to participate in your newly-adopted procedure. Thus, if there are any costs incurred, the homeowners association must absorb them.
8. **Consider outside help.** Note that there is nothing stopping you from adopting a procedure using an outside party to help reach a resolution. In fact, the statute specifically references the "maximum, reasonable use of available local dispute resolution programs involving a neutral third party..." It references the Web sites of the Department of Consumer Affairs and the United States Department of Housing and Urban Development as resources. However, remember that owners may not be charged a fee to participate.

Part of the difficulty with crafting a procedure involves the potential wide variety of disputes it must be designed to address. Your procedure will need to include enough flexibility so that you can make it work in your community.

As with any legal question, remember that the assistance of legal counsel can be extremely valuable in crafting and adopting a dispute resolution procedure. Thus, if you have any questions, thoughts or concerns, you should discuss them with your legal counsel. ■

Ken Dillingham is the chair of the legislative action committee for CAI-San Diego.

Tongue-in-Cheek

Top Ten List of Why to Amend Your CC&Rs

BY KEN DILLINGHAM, ESQ.

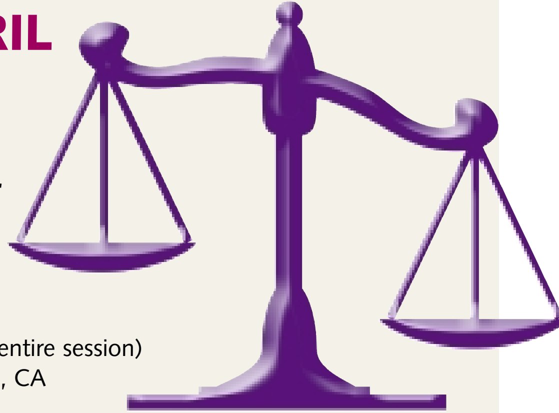
1. You don't like them, don't want to use them, and the owners are revolting.
2. You can't read them; they've been copied 12 million times.
3. They don't comply with law.
4. They have illegal provisions in them.
5. They restrict your ability to collect assessments.
6. They don't match the maintenance scheme developed over the years.
7. They have been superseded by federal law.
8. There's so many amendments that you have to bookmark 12 pages to find anything.
9. They're written so only an attorney can understand them.
10. They don't protect the Board of Directors to the fullest extent possible.

Haven Management Lunch & Learn on New Laws Effective January 2005 brings lots of questions on the new "Meet & Confer" requirement. Sally Tashman, Dan Saldana, Patee Barta and Ken Dillingham (standing) discuss some scenarios and options to this new law with the Haven managers.

Leadership in Legal Education

MARCH & APRIL

REMEMBER TO REGISTER FOR LAW CLASSES – **SPACE IS LIMITED**



March 5, 2005 — Manager Certification – California Common Interest Development Law

■ UC RIVERSIDE EXTENSION
8 a.m. to 5 p.m. (Must attend entire session)
1200 University Ave., Riverside, CA
(951) 827-7820
E-mail: law@ucx.ucr.edu; Website: www.UCRExtension.net/law
Registration - $105 (includes materials and parking, 1 meeting)
EDP 043-LPS-F68 (Class Code)

April 9, 2005 – Homeowner Association Law for Board Members

■ CITRUS COLLEGE
9 a.m. to 12 Noon - Joel Kriger, Instructor
1000 West Foothill Blvd.
Glendora, CA 91741-1899
Contact: Continuing Education, (626) 852-8022
Registration - $45 ($12 for 2005 Condo Blue Book)
#9581 (Class Code)

Ponder this...

Beginnings — Every idea has a birth... a beginning. It usually requires some silences, so listen carefully!

— Author Unknown

No-Dogs Provision

▶ CONTINUED FROM PAGE 1

Association questioned the sufficiency of the information provided, it had the duty to request further documentation.

Association Suggests Companion Cat Instead – Allergy Prevents Switch

Note that at one point, the Association suggested that the Elebiari's exchange the companion dog for a companion cat which would be allowed. Jayne Elebiari is allergic to cats, so the exchange was not a feasible option. It is not clear whether the FEHC or the Court of Appeal would have enforced the CC&Rs against the Elebiaris and in favor of the Association by making the Elebiaris obtain a cat in place of the dog if Mrs. Elebiari were not allergic.

Court of Appeal Says Therapeutic Presence of Dog Qualifies

Finally, the Court of Appeal clarified that a disabled person need not be incapable of any use and enjoyment of his or her home before requiring a reasonable accommodation. The owners did not need to prove the dog was a service animal, only that its presence was therapeutic to qualify for reasonable accommodation under the California Fair Employment and Housing Act (Government Code Sections 12900 *et seq.*).

Read more about "What's Fair about Fair Housing?" in our April issue of the A&K News.

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