

# News

Joel M. Kriger, APC - Community Association Division

*Wooden Deck Constructed at Considerable Risk*

## Homeowner Breaches CC&Rs

BY JOEL M. KRIGER, ESQ.



In a local case, *Woodridge Escondido Property Owners Association v. Nielsen* (2005) 30 Cal.App. 4th 559, the Court of Appeal upheld the decision of the Superior Court sitting in Vista which ruled in favor of the homeowners association in a dispute regarding the construction of a wooden deck over an easement.

### The Facts and the Refusal

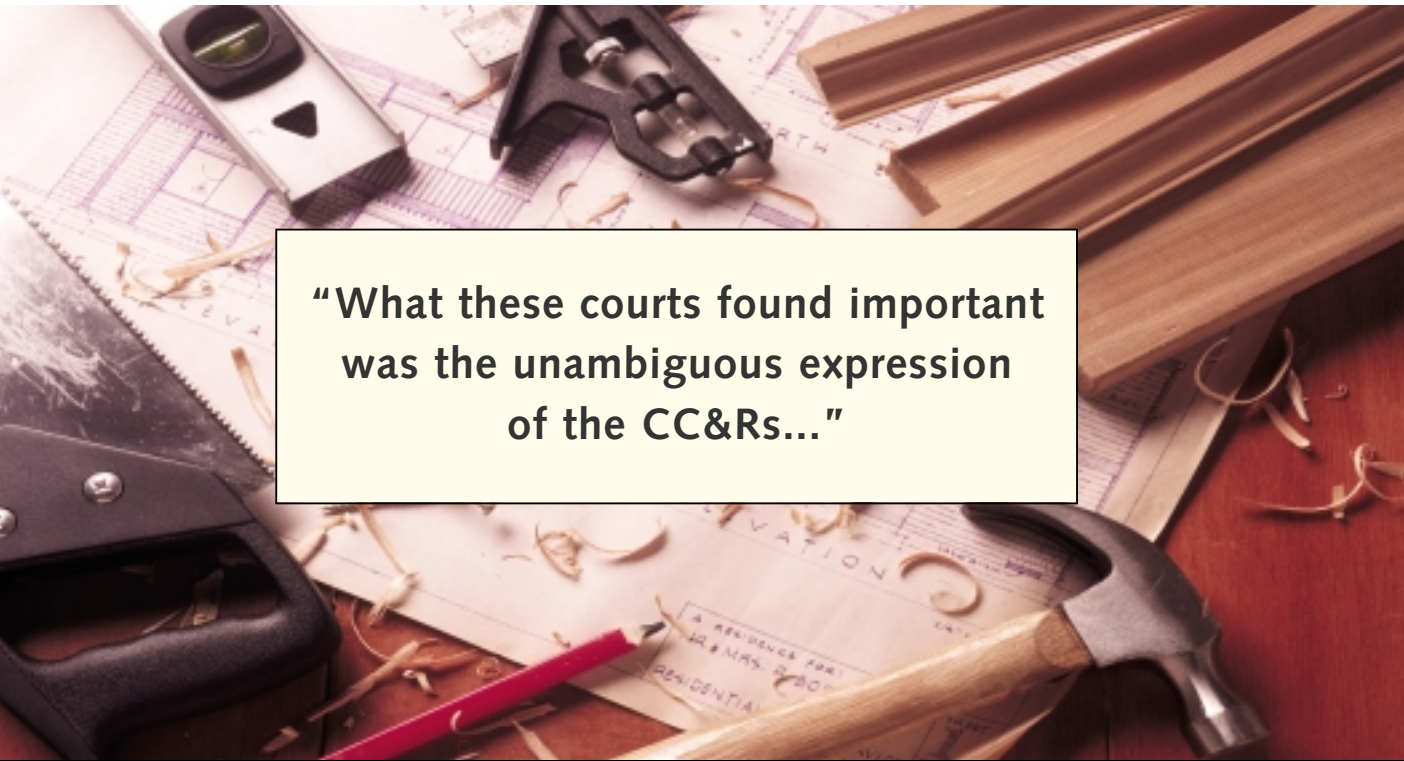
The Woodridge community contains “zero lot line” properties, meaning that one exterior side wall of each home is built on one of the side yard property lines of the lot on which the home is located. Each lot has a five-foot easement over the side yard of the adjacent lot that belongs to the owner of that neighboring lot. Defendant Paul Nielsen owned a home in Woodridge and had a side yard easement over the adjoining property of his neighbor, Virginia Kendall. With the permission of the Woodridge Architectural Committee, Nielsen constructed a wooden deck that encroached upon the easement. The Association’s Board of Directors later determined that the

Architectural Committee had erroneously approved the construction of the deck. In this regard, the Woodridge CC&R’s expressly prohibited the installation of “any permanent structure other than irrigation systems” in the easement area. The Board of Directors, therefore, ordered Nielsen to remove the portion of the deck that encroached upon the easement, and offered to pay for the removal cost. Nielsen refused the offer, and litigation by the Association for removal of the deck ensued.

### Court Rules for Association

The Association prevailed in the Superior Court. Nielsen appealed and the Court of Appeal affirmed the Superior Court’s Judgment for an injunction (to force removal of the encroaching deck) and attorneys fees in favor of the Association. The Court of Appeal determined that the Association did not act arbitrarily in demanding the removal of the deck after the Architectural Committee’s erroneous approval, because the CC&Rs were clear in prohibiting the construction of such a permanent structure.

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“What these courts found important was the unambiguous expression of the CC&Rs...”

## CC&R Breaches

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### Important Issues Addressed by Decision

Among many, two important issues were addressed by the *Woodridge* decision. The first was addressed implicitly – may the Board of Directors overrule the Architectural Committee to the detriment of the homeowner? The trial and appellate court both answered this question “yes,” because the provision in the *Woodridge* CC&R’s was clear in prohibiting encroachments into the easement area.

Nielsen cited case law supporting his argument that the *Woodridge* Board did not have the authority to overrule the Architectural Committee which both the Superior Court and Court of Appeal distinguished. What these courts found important was the unambiguous expression of the CC&R’s on the subject.

The second issue was addressed more explicitly – does balancing the

relative hardships of the parties factor into an injunction action when the homeowner has already relented (in this case, by removing the deck during the pendency of the action)? The Court of Appeal acknowledged that the issue was probably moot, but nevertheless upheld the injunction because, among

**“A homeowner should not have the ability to so callously manipulate the situation after having caused such a ruckus (and expense) in obvious contravention of the CC&R’s.”**

other things, a homeowner should not have the ability to so callously manipulate the situation after having caused such a ruckus (and expense) in obvious contravention of the CC&R’s.

### Similar Case, Same Result — Homeowners Pay Expenses

In 2004, a Michigan appellate court sided with the plaintiff association when the defendant homeowner installed a

backyard deck that did not conform to the CC&R’s. In that case, *Village of Hickory Pointe Homeowners Association v. Smyk* (2004) 262 Mich.App. 512; 686 N.W.2d 506, the homeowner argued that the violation was so minor as to not warrant enforcement, lost his argument, and was forced to cure the

breach. (See *A&K News*, Second Quarter, 2005.) In the 2005 *Woodridge* decision, the California appellate court for San Diego County followed suit with the Michigan appellate court, and similarly decided that technical breaches of an association’s CC&R’s are enforceable regardless of size and regardless of impact on

the breaching homeowner, when the CC&R’s provide more than ample notice of what is required. In both the Michigan and California cases, the homeowners not only failed in their bids to circumvent the CC&R’s, but they paid dearly for their efforts by being ordered to cure the breaches and pay the Associations’ litigation expenses. ■

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## Rules for Election and Voting

### Bulletin:

### New Laws Regarding Elections Become Effective July 1, 2006

Last year the California legislature enacted Civil Code Sections 1363.03 and 1363.04, effective July 1, 2006. Among other things, homeowners associations must now begin enacting specific Rules for Election and Voting consistent with the new legislation some four months (120 days) prior to their Annual Meetings.

Anderson & Kriger is in the process of developing a checklist for its clients to use in meeting the statutes’ requirements, and a core set of provisions from which the firm can help its clients develop specific Rules for Election and Voting applicable to them.

It is important to have your election rules in place and to remember that “one size does not necessarily fit all” associations. The law does give options on setting up these election rules, however, they must be consistent with the association’s governing documents. We invite you to call and get a quote on drafting the specific election rules for your association consistent with their current CC&R’s.

This will ensure that we – and you – can put the process in place well before your next Annual Meeting.

Call (800) 425-6397 ext. 322. ■



Update — Provide Specific Authority for Each Tow

## Towing of Vehicles from Association Property

By Lauri Croce, Esq.



The A&K First Quarter, 2003 Newsletter article *Towing of Vehicles from Association Property* explained that the California Vehicle Code, Section 22658, applies to all private property owners, including community associations, with respect to all illegally parked cars on private property. Section 22658 generally states that a private property owner can have an illegally parked car towed in one of four situations:

1. An appropriate sign is posted;
2. The car owner is given 96-hours' notice that the car will be towed;
3. The vehicle is inoperable; or
4. The land upon which the vehicle is located is improved with a single-family home.

### Posting of Signs and Noticing

We also explained that California Vehicle Code Section 22658.2 provides an additional basis for towing if the private property owner is a community association that chooses to rely upon signs posted at the entrances to the development as the basis for its towing decisions. That is a private-association-owner can have illegally parked vehicles towed if it follows the specific rules of Section 22658.2, which include both the posting of signs and the sending of notice after towing.

### Vehicle Code Did Not Require Personal Authorization — Towers Patrolled/Towed

At the time our previous article was published in 2003, the United States District Court for the Southern District of California (sitting in San Diego) issued an injunction providing that California's Vehicle Code Section 22658(1) (1) does not require a private property owner to give its personal and contemporaneous authorization for towing each and every time the tow-truck operator came upon the property to remove the illegally parked car. Under the authority of that injunction, we advised that a homeowners' association's general authorization to the tow-truck operator is sufficient to permit towing if the appropriate signs are posted and notice is sent thereafter.

### Now, Is General Authorization for Towing Necessary?

Last year, in May 2005, the Ninth Circuit Court of Appeal dissolved the lower court's injunction in *Tillison dba West Coast Towing v. City of San Diego*. The Ninth Circuit's *Tillison* decision (406 F.3d 1126) is based upon a legal determination that Subdivision (1)(1) of Vehicle Code Section 22658 is preempted by Federal law and therefore the District Court has no right to issue the injunction. The *Tillison* case, however, leaves open the substantive question of whether a general authorization for towing is necessary. In fact, a careful reading of Vehicle Code Section 22658.2 (which applies solely to homeowners associations) suggests that the *Tillison* case has no affect upon homeowners associations. (Subdivision (d) of



Section 22658.2 incorporates by reference portions of Vehicle Code Section 22658, but conspicuously excludes Subdivision (1).) But the legislation is ambiguous.

In this new era, the practical concern for our clients is whether the association, as opposed to the towing company, should bear the burden (i.e., cost) of being wrong with respect to whether general authorizations or specific authorizations to tow from homeowners association property are required. Until West Coast Towing or one of its colleagues challenges the ambiguity in court — or a homeowners association prevails upon its state house representative to clear up the ambiguity — the cost to a homeowners association of having to bear the cost of an illegal tow or supporting the tow in court is great. Hence, out of an abundance of caution our office has advised our clients, since the *Tillison* decision, to provide specific authority for each tow.

### Written Authority and Representative Present

Such specific authority requires that the association provide written authority and that a representative of the association be present every time a vehicle is towed. We continue, also, to remind our clients to be sure that their published Rules and Regulations do not inadvertently alter the rights and obligations of the association with respect to the towing of members' or their tenants' vehicles; Rules and Regulations apply to members only, but the towing statutes apply to all persons who avail themselves of parking spaces - regardless of whether the person is a member of the association or not. The least confusing course of action is to make sure your Rules & Regulations are consistent with the statutes, and limit all towing references in the Rules & Regulations to Vehicle Code Sections 22658 and 22658.2, by either directing members to the statutes, or paraphrasing or quoting the statutes *verbatim*. ■

## RETAINER PROGRAM

### ANNUAL CHECKUP BENEFIT

The Annual Checkup is an important benefit of the Retainer Program consisting of a "free hour" with your attorney. Please remember to take advantage of this benefit and set up your association's Annual Checkup.

The following are your options for utilizing this benefit:

**1. Conference Call** — Your attorney will conference in using a speaker phone and will attend one-hour via this method. If you require the attorney to conference in past the hour allotted on the program, the association will be billed at the retainer program hourly rate.

**2. In-Person Travel** — If your attorney is asked to travel for the one-hour meeting, any excess time for preparation or travel will be billed at our regular discounted rates.

**3. Corporate Office Visit** — Should your association decide they want to travel to our corporate office in San Diego, the meeting will be held in our conference room at no charge to the association.

Please enjoy the benefits of our helpful "Retainer Program." If you are reading this and want more information on this program, please call (619) 589-8800, ext. 322 and a packet of information will be mailed, faxed or e-mailed to you.

### CAI Awards – CLAC Donation

San Diego CAI's 2005 Member of the Year Patee Barta presents the Awards Mini-Trade Show Grand Prize donated by Joel M. Kriger to Rick Rodstrom of N. N. Jaeschke Company.

The prize was a package for golf or equestrian offerings and a stay at the famous Warner Hot Springs Ranch.



### 2006 CACM LAW SEMINAR



After a grueling morning of rehearsal for the 2006 CACM Law Seminar Internal Dispute Resolution (IDR) / Alternative Dispute Resolution (ADR) production led by Joel Kriger and Directed by Patee Barta, the Cast of "Dispute Resolution: The Morning After" sit down for the luncheon on January 24 at the Long Beach Convention Center.

**Front:** Kyle Remp, Menas Management; Debbie Evans, Professional Community Management; Suzanne Bolton, Merit Management; Doug Christison, Christison Management.

**Back:** Our CACM Faculty Leader Joel M. Kriger, Esq.; Patee Barta, Joel M. Kriger APC; Robin Seigle, National Conflict Resolution Center; and Joanne Pena, Horizon Management.



Joel Kriger was recognized at the luncheon for his legal presentations as a member of the CACM Legal Steering Committee.

Representing from Condominium Management Services (CMS) at the 2006 CACM Law Seminar from left is Hilda Pulido next to Attorneys Lauri Croce and Jamie Schwartz with CMS Manager Desiree Nichols.

It's great getting the support of our clients during a "General Session Presentation on Dispute Resolution."



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