

common**INTERESTS**

Published by:
HARLE, JANICS & KANNEN
a law corporation
www.hjklawfirm.com

Issue 2

The Legal Newsletter for Community Associations

2000



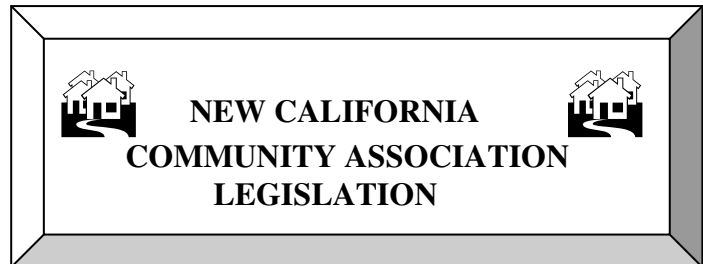
THE WIZARD OF AAS . . . SUPREME COURT LIMITS CONSTRUCTION DEFECT RECOVERIES

On December 4, 2000, the California Supreme Court put a hex on construction defect recovery. In its much-anticipated decision in *Aas v. Superior Court*, 2000 Daily Journal D.A.R. 12831 (2000), the Court ruled that homeowners and community associations may *not* recover monetary damages under a negligence theory from the developer, contractors and subcontractors for construction defects that have not caused injury to person or property. Although the decision makes it more difficult for homeowners and associations to recover under a negligence theory, recovery may still be possible under contract, warranty or fraud theories.

In declining to recognize a negligence cause of action for construction defects where no injury has occurred, the majority opinion did invite the state legislature to take up the subject. Presumably the next round of battles on this issue will be fought in the chambers of the state Senate and state Assembly, and not in the courts.

INSIDE

<i>The Wizard of Aas . . .</i>	1
<i>New California Community Association Legislation</i>	1
<i>Announcements</i>	4



1. Restrictive covenants in governing documents (AB 1493; Nakano)

This is the cleanup bill to last year's legislation that required amendment and restatement of community association governing documents to delete certain categories of unenforceable restrictions. Because last year's bill was so bad, the only real effective cleanup would have been to repeal it. Instead, the legislature tried to make a silk purse out of a sow's ear.

The bill amends Government Code Section 12956.1 to change the text of the disclosure statement that county recorders, title insurance companies, escrow companies, real estate brokers, real estate agents and associations must affix to any recorded governing document (generally CC&R's) it distributes. The new text reads as follows:

If this document contains any restriction based on race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.1 of the Government Code. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.

In addition, the previous disclosure statement had to be in 20-point boldface red type; the new disclosure is required to be in 14-point boldface type; red type is no longer required.

Continued on page 2

commonINTERESTS

Published by

Harle, Janics & Kannen

575 Anton Boulevard, # 460
Costa Mesa, CA 92626

Telephone: (714) 429-0600

Facsimile: (714) 429-0699

E-mail: hjklaw@hjklawfirm.com

Website: www.hjklawfirm.com

JAKOB S. HARLE

graduated *magna cum laude* from the University of California, Los Angeles in 1984 and earned his law degree from the UCLA School of Law in 1987, where he served as Managing Editor of the *UCLA Law Review*. Mr. Harle currently chairs the Publications and Media Committee of the Orange County Regional Chapter of CAI and serves on the Chapter's board of directors.

KATHLEEN A. JANICS

received both a bachelors and a masters degree from the University of Southern California, in 1983 and 1984, respectively. In 1990, she graduated *cum laude* from the University of San Diego School of Law where she served as an intern for the Honorable Richard Huffman at the Fourth District Court of Appeals, and as an associate editor of the *Journal of Contemporary Legal Issues*. Ms. Janics is an active member of CACM.

KAREN A. KANNEN

received a bachelor of science degree from Cornell University in 1985 and graduated *cum laude* from the University of San Diego School of Law in 1990. While attending law school, Ms. Kannen was a member of the *San Diego Law Review*. She is also admitted to the Colorado Bar.

Permission to reprint articles in this newsletter is hereby granted providing notice is given to **Harle, Janics & Kannen** at (714) 429-0600 and proper credit is given as follows: "Reprinted from **commonINTERESTS**, The Legal Newsletter for Community Associations. Copyright © by Harle, Janics & Kannen, all rights reserved."

While every effort is made to ensure accuracy, the materials in this newsletter are for informational and educational purposes and are not intended to be exhaustive. Readers should not act on information contained herein without further seeking professional legal advice.

Continued from page 1

The bill leaves intact the requirement of last year's bill that an association's board of directors can unilaterally (*i.e.*, without owner approval) amend and restate documents to delete violative restrictive covenants, including the requirement that an association must do so within thirty days after receipt of notice that a governing document contains violative provisions.

The bill also provides for a procedure applicable to properties not located in a common interest development whereby an owner can apply to the Department of Fair Employment and Housing for a determination of whether a particular restriction violates fair housing laws and is therefore void. This procedure also allows for the owner to effect the amendment and restatement of the offending document. However, as noted above, this procedure expressly does *not* apply to common interest developments.

As we noted in our review of last year's California community association legislation, last year's bill was a pointless exercise since the types of restrictions subject to being "amended and restated" out of a document are unenforceable anyway. From a cynic's standpoint, it was purely a political exercise so that legislators could say they voted against discrimination. The bill allowed legislators to establish a voting record, but without giving a care to the inconveniences they created.

The bill was identified as emergency legislation, effective immediately.

2. Pets (AB 860; Thomson)

Like the creature in a bad horror movie, this bill kept coming back from the dead after having been killed several times by representatives of the common interest development industry. It finally passed both houses of the state legislature, and was signed into law by Governor Davis.

This bill adds Section 1360.5 to the Civil Code to prohibit an association's governing documents from preventing the owner of a separate interest in a common interest development from keeping at least one "pet" (defined as any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the association and the owner) in the community, subject to reasonable rules and regulations. Any new rules or regulations an association adopts restricting the number of pets an owner may keep do not apply to an owner's pet that already resides in the community (*i.e.*, existing pets are grandfathered). So, if an owner has fifty cats and the association adopts a rule limiting the number of cats to three, all fifty cats would be grandfathered and would therefore be allowed to remain.

The bill is effective on January 1, 2001, and only applies to governing documents "entered into, amended, or otherwise modified on or after that date." Therefore, any pet prohibitions in effect prior to January 1, 2001 are valid. However, the manner in which the statute is written suggests that, if CC&R's are amended after January 1, 2001, even if the amendment has nothing to do with pets, any pre-existing pet prohibitions become subject to Section 1360.5 and therefore void. It is unclear whether that is the legislature's intent, or whether the legislation was simply sloppily drafted. Note that, even though pets cannot be prohibited after January 1, 2001, they are still subject to reasonable rules and regulations. The bill also contains similar provisions applicable to mobilehome parks.

Continued on page 3

Continued from page 2

The worst part of this bill is its micromanagement aspects. The legislature has substituted its “one size fits all” judgment for the wishes of homeowners. Thus, even if a community is not physically set up for animals, or if the owners want a pet-free environment for allergy or other reasons, a pet prohibition would be unenforceable. This continues a micromanagement trend that began with the adoption of Civil Code Section 1376 (California’s antenna and satellite dish law) in 1995. Who knows where it will end?

3. Member discipline (AB 1823 and 2284; Dutra)

These bills add a new subparagraph to Civil Code Section 1363 and Civil Code Section 1368. The change to Section 1363 imposes new notice requirements on an association seeking to discipline a member. Under the new requirements, the association’s board of directors is required to notify the member it wishes to discipline of the meeting at which the board will consider or impose the discipline. The notice must be in writing, must be delivered either personally or via first-class mail, and the member must be notified at least ten days prior to the meeting. The notice must contain at least the following information:

- (a) date, time and place of the meeting;
- (b) the nature of the alleged violation; and
- (c) a statement that the member has a right to attend and may address the board at the meeting.

If the board imposes discipline, the board is required to notify the member in writing by personal delivery or first-class mail within fifteen days following the action. A disciplinary action is not effective unless all of these requirements are satisfied.

The change to Section 1368 adds new items to the list of materials that an association is required to provide to a selling owner upon request. An association will henceforth be required to provide a copy or summary of any notice previously sent to the owner pursuant to Section 1363(h) (*i.e.*, the notice described above) with respect to any alleged violations that remain unresolved at the time of the request. Further, in addition to providing information regarding unpaid regular and special assessments, an association will also have to provide information of any monetary fines or penalties levied on the owner’s separate interest that are unpaid on the date of the statement.

A question that has arisen is whether towing a vehicle from the common interest development under Vehicle Code Section 22658.2 would be permitted without the foregoing notice and hearing procedure. It is our view that towing is statutorily authorized and not the type of “disciplinary action” contemplated in this legislation. Therefore, we do not believe this procedure must be followed in order to tow a vehicle.

4. Assessments (AB 1859; McClintock)

This bill amends Civil Code Section 1366 to provide that regular assessments imposed or collected to perform an association’s obligations under its governing documents are exempt from execution by a judgment creditor (*i.e.*, a party who has been awarded a judgment against an association in a lawsuit) to the extent necessary for the association to perform essential services, such as paying for utilities and insurance. The determination of which services are essential is to be made by a court.

The exemption afforded by the bill does not apply to state tax liens, mechanic’s liens or consensual pledges, liens or encumbrances approved by a majority of a quorum of the owners.

The bill came about as the result of a Ventura County case where the association was on the brink of bankruptcy. After January 1, 2001, an association will be able to continue to provide essential services even if a lawsuit results in an adverse money judgment against it.

5. Senior housing (SB 2011; Escutia)

This bill makes numerous revisions to California law relating to housing for senior citizens. There is no grand theme to the changes, just a series of attempts to “fine tune” existing provisions, including the following:

- (a) changing the list of persons entitled to reside in a senior housing community with a resident to include a disabled child or grandchild who needs to live with the resident because of the disabling condition (the

Continued on page 4

Continued from page 3

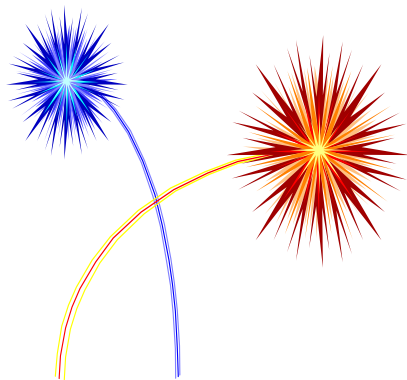
disabled person can be required to vacate the premises after the disabling condition ends on six months' written notice, or if the disabled person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated by a reasonable accommodation);

(b) changing the size requirement for "senior citizen housing development" from variable based on the population density in the area to 20 or more units in Riverside County and 35 or more units in all other counties; and

(c) liberalizing the rules to allow continuing occupancy by a non-senior resident providing live-in, long-term or terminal health care to a resident.

6. Condominium conversions (SB 453; O'Connell)

This bill was an urgency statute that became effective on May 24, 2000. Its ostensible purpose was to make conversions from community apartment projects and stock cooperatives to condominium projects easier. Whether it achieved that purpose, however, is debatable. 🏠



Announcing . . .

We are pleased to announce that **Jakob Harle** has been elected to the board of directors of the Orange County Regional Chapter of the Community Associations Institute, and that **Karen Kannen** was re-elected to a second term as President of the Tri-County Chapter of the Leukemia & Lymphoma Society. We are also proud to announce that the **Harle, Janics & Kannen** website is up and running. Please visit us at www.hjklawfirm.com.

Harle, Janics & Kannen
575 Anton Boulevard, Suite 460
Costa Mesa, CA 92626

ADDRESS CORRECTION REQUESTED