RESOLUTION 07-01-2019

DIGEST
Landlord-Tenant: Allergy Exception to Residential Service Dog Accommodation Requirement
Amends Civil Code section 54.1 and California Code of Regulations, title 2, section 11065 to exempt landlords from service dog accommodations when tenant has a documented allergy.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 54.1 and Californian Code of Regulations, title 2, section 11065 to exempt landlords from service dog accommodations when tenant has a documented allergy. This resolution should be disapproved because it does not sufficiently define primary residence and does not address situations where an existing tenant acquires a service animal after a tenant with allergies moves into the complex.

Current law ensures that disabled persons have equal access to housing accommodations, by prohibiting landlords from refusing to lease a "housing accommodation" to a tenant because that tenant uses a service dog, guide dog, or signal dog. (Civ. Code, § 54.1, subd. (b)(6)(A).) Civil Code section 54.1, subdivision (b)(2) already allows exclusion as to "any single family residence the occupants of which rent, lease, or furnish for compensation not more than one room in the residence."

This resolution would carve out an exception to that prohibition by allowing a landlord to refuse to rent a "housing accommodation" to an individual who uses a service dog, guide dog, or signal dog, if the housing accommodation is "a portion of a primary residence and a resident has a medically-documented allergy to dogs."

The language proposed in this resolution, as lawful grounds for denying housing to disabled persons, is vague in that it does not sufficiently define "primary residence." It is not clear whether the exclusion of service animals would apply to all units in a multi-unit apartment complex where a single resident in one unit has an allergy to the animal. It also does not address situations where a service animal is subsequently acquired by an existing resident.

The resolution's proposed revision to California Code of Regulations, title 2, section 11065, which defines "reasonable accommodations," uses the same language proposed for Civil Code section 54.1, and therefore is similarly vague and over-broad.

The question of whether a medically-documented allergy of an existing resident of a residential unit of a multi-unit complex should "trump" the protected right of a prospective tenant with a disability and a service animal to obtain access a place to live, is one that should be considered. However, as worded, the resolution does not clearly address or resolve that issue.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 54.1 and that the administrative agency amend California Code of Regulations Title 2, Division 4.1, Chapter 5, Subchapter 2, Article 9, Section 11065, to read as follows:

§54.1

(a) (1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) As used in this section, "telephone facilities" means tariff items and other equipment and services that have been approved by the Public Utilities Commission to be used by individuals with disabilities in a manner feasible and compatible with the existing telephone network provided by the telephone companies.

(3) "Full and equal access," for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.

(b) (1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) "Housing accommodations" means any real property, or portion of real property, that is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations included within subdivision (a) or any single-family residence the occupants of which rent, lease, or furnish for compensation not more than one room in the residence.

(3) (A) A person renting, leasing, or otherwise providing real property for compensation shall not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing rented premises if the modifications are necessary to afford the person full enjoyment of the premises. However, any modifications under this paragraph may be conditioned on the disabled tenant entering into an agreement to restore the interior of the premises to the condition existing before the modifications. No additional security may be required on account of an election to make modifications to the rented premises under this paragraph, but the lessor and tenant may negotiate, as part of the agreement to restore the premises, a provision requiring the disabled tenant to pay an amount into an escrow account, not to exceed a reasonable estimate of the cost of restoring the premises.

(B) A person renting, leasing, or otherwise providing real property for compensation shall not refuse to make reasonable accommodations in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.

(4) This subdivision does not require a person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for an individual with a disability than for an individual who is not disabled.

(5) Except as provided in paragraph (6), this part does not require a person renting, leasing, or providing for compensation real property, if that person refuses to accept tenants who have dogs, to accept as a tenant an individual with a disability who has a dog.

(6) (A) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for a person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired on the basis that the individual uses the services of a guide dog, an individual who is deaf or hard of hearing on the basis that the individual uses the services of a signal dog, or to an individual with any other disability on the basis that the individual uses the services of a service dog, or to refuse to permit such an individual who is blind or visually impaired to keep a guide dog, an individual who is deaf or hard of hearing to keep a signal dog, or an individual with any other disability to keep a service dog on the premises.

(B) Except in the normal performance of duty as a mobility or signal aid, this paragraph does not prevent the owner of a housing accommodation from establishing terms in a lease or rental agreement that reasonably regulate the presence of guide dogs, signal dogs, or service dogs on the premises of a housing accommodation, nor does this paragraph relieve a tenant from any liability otherwise imposed by law for real and personal property damages caused by such a dog when proof of the damage exists.

(C) (i) As used in this subdivision, "guide dog" means a guide dog that was trained by a person licensed under Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336).

(ii) As used in this subdivision, "signal dog" means a dog trained to alert an individual who is deaf or hard of hearing to intruders or sounds.

(iii) As used in this subdivision, "service dog" means a dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.

<u>(D) Notwithstanding this or any other subdivision, it shall not be deemed a denial of equal access to housing accommodations for a person, firm, or corporation to refuse to lease or rent housing accommodations on the basis that the individual uses a guide dog, signal dog, or service dog when the housing accommodations in question are a portion of a primary residence and a resident has a medically-documented allergy to dogs.</u>

(7) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for a person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired, an individual who is deaf or hard of hearing, or other individual with a disability on the basis that the individual with a disability is partially or wholly dependent upon the income of his or her spouse, if the spouse is a party to the lease or rental agreement. This subdivision does not prohibit a lessor or landlord

from considering the aggregate financial status of an individual with a disability and his or her spouse.

(c) Visually impaired or blind persons and persons licensed to train guide dogs for individuals who are visually impaired or blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or guide dogs as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and persons who are deaf or hard of hearing and persons authorized to train signal dogs for individuals who are deaf or hard of hearing, and other individuals with a disability and persons authorized to train service dogs for individuals with a disability, may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in subdivisions (a) and (b). These persons shall ensure that the dog is on a leash and tagged as a guide dog, signal dog, or service dog by identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Division 14 of the Food and Agricultural Code. In addition, the person shall be liable for any provable damage done to the premises or facilities by his or her dog.

(d) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and this section does not limit the access of any person in violation of that act.

(e) This section does not preclude the requirement of the showing of a license plate or disabled placard when required by enforcement units enforcing disabled persons parking violations pursuant to Sections 22507.8 and 22511.8 of the Vehicle Code.

2 CCR §11065

As used in this article, the following definitions apply:

[subdivisions (a) through (o) remain unchanged]

(p) “Reasonable accommodation” is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;
(G) Permitting an alteration of when and/or how an essential function is performed;
(H) Providing an adjustment or modification of examinations, training materials or policies;
(I) Modifying an employer policy;
(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);
(K) Providing additional training;
(L) Permitting an employee to work from home;
(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);
(N) Providing a reassignment to a vacant position, consistent with section 11068(d); and
(O) other similar accommodations.
(3) "Reasonable accommodation" shall not be construed to prohibit a person, firm, or corporation from refusing to allow an animal in a residential dwelling unit that qualifies as a primary residence of the landlord or another person, and a resident has a medically-documented allergy to the animal.
[subdivisions (q) and (r) remain unchanged]

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The legal requirement for landlords to allow accommodations for those with disabilities who need them is generally good and necessary. A problem can occur, however, when one person's accommodations are a physical threat to another person. Such is the case with requiring a landlord to allow a service animal on his or her primary residence when someone who lives there is allergic.

When someone with an allergy is renting out a portion of their primary residence and is faced with a prospective tenant who needs a service animal, the person currently has three options: (1) accept that prospective tenant, and risk having constant red itchy eyes, coughing and wheezing, runny nose, sneezing, skin reactions, or hives; (2) deny that prospective tenant and risk lawsuits; or (3) take the offer off the market and not allow anyone to rent it. People should be able to prohibit things in their home that they are allergic to without risking a lawsuit or having to shut down.

The Solution: This resolution allows those who are renting out a portion of their primary residence to not let animals on their property if a resident has a medically-documented allergy. This narrow exception ensures that those with allergies to an animal are allowed to prohibit that animal in their primary residence.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 07-02-2019

DIGEST
Landlord-Tenant: Creation of a Pet Security Deposit
Amends Civil Code section 1950.5 to allow landlords to collect a separate pet security deposit in addition to a security deposit.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 1950.5 to allow landlords to collect a separate pet security deposit in addition to a security deposit. This resolution should be disapproved because the law already provides for a reasonable security deposit, which may be used upon termination of the lease to clean the premises or to repair damage, regardless of the cause.

Current law allows a landlord to collect a security deposit which may be applied toward (1) compensation for the tenant's non-payment of rent; (2) the repair of damages to the premises, exclusive of ordinary wear and tear caused by the tenant or by a guest or licensee of the tenant; (3) cleaning of the premises necessary to return the unit to the same level of cleanliness that existed at the inception of the tenancy; (4) to remedy future defaults by the tenant under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear. (Code Civ. Proc., § 1950.5, subd. (b).) The amount of the security deposit may not exceed two months' rent for an unfurnished residential unit, and three months' rent for a furnished residential unit. (Code Civ. Proc., § 1950.5, subd. (c).) A tenant may be charged an additional security deposit amount for a waterbed, not to exceed one-half of one month's rent. (Code Civ. Proc., § 1940.5 subd. (g).) Therefore, landlords can already require deposits that would protect them from damage caused by pets.

Determining whether damage is attributable solely to a pet may prove difficult if not contentious. Allowing for a separate "pet security deposit" would likely lead to disputes and litigation over whether damage was caused entirely or in part by a pet and create questions regarding whether reimbursement for damage should be subject to forfeiture of pet security deposit or the normal security deposit. Further, it is not clear what limits, if any, would exist regarding the amount of security deposit that could be charged for a pet, or what types of pets would be subject to a security deposit.

Under current law, a security deposit covers damage to premises which occurs during the tenancy, regardless of proof of a specific causal attribution. (Code Civ. Proc., § 1950.5, subd. (b).) The security deposit already provides a reasonable reserve for the landlord to collect and hold upfront, covering risks and exigencies of loss occasioned by the rental, whatever they may be or their cause.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Civil Code section 1950.5, to read as follows:

§1950.5

(a) This section applies to security for a rental agreement for residential property that is used as the dwelling of the tenant.

(b) As used in this section, "security" means any payment, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge, except as provided in Section 1950.6, that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment of rent.

(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.

(3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy. The amendments to this paragraph enacted by the act adding this sentence shall apply only to tenancies for which the tenant's right to occupy begins after January 1, 2003.

(4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement.

(c) A landlord may not demand or receive security, however denominated, in an amount or value in excess of an amount equal to two months' rent, in the case of unfurnished residential property, and an amount equal to three months' rent, in the case of furnished residential property, in addition to any rent for the first month paid on or before initial occupancy.

This subdivision does not prohibit an advance payment of not less than six months' rent if the term of the lease is six months or longer.

This subdivision does not preclude a landlord and a tenant from entering into a mutual agreement for the landlord, at the request of the tenant and for a specified fee or charge, to make structural, decorative, furnishing, or other similar alterations, if the alterations are other than cleaning or repairing for which the landlord may charge the previous tenant as provided by subdivision (e).

(d) A landlord may demand and receive pet security in addition to the securities provided in subdivision (c), to be based upon the type of each pet and the size of each pet and subject to the exclusions in Civil Code section 54.2. As used in this subdivision, "pet security" means any payment, fee, deposit, or charge that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with any of the following:

(1) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the pet.

(2) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception.

~~(d)~~(e) Any security shall be held by the landlord for the tenant who is party to the lease or agreement. The claim of a tenant to the security shall be prior to the claim of any creditor of the landlord.

~~(e)~~(f) The landlord may claim of the security only those amounts as are reasonably necessary for the purposes specified in subdivision (b). The landlord may not assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

~~(f)~~(g) (1) Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord shall notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection. The requirements of this subdivision do not apply when the tenancy is terminated pursuant to subdivision (2), (3), or (4) of Section 1161 of the Code of Civil Procedure. At a reasonable time, but no earlier than two weeks before the termination or the end of lease date, the landlord, or an agent of the landlord, shall, upon the request of the tenant, make an initial inspection of the premises prior to any final inspection the landlord makes after the tenant has vacated the premises. The purpose of the initial inspection shall be to allow the tenant an opportunity to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security. If a tenant chooses not to request an initial inspection, the duties of the landlord under this subdivision are discharged. If an inspection is requested, the parties shall attempt to schedule the inspection at a mutually acceptable date and time. The landlord shall give at least 48 hours' prior written notice of the date and time of the inspection if either a mutual time is agreed upon, or if a mutually agreed time cannot be scheduled but the tenant still wishes an inspection. The tenant and landlord may agree to forgo the 48-hour prior written notice by both signing a written waiver. The landlord shall proceed with the inspection whether the tenant is present or not, unless the tenant previously withdrew his or her request for the inspection. Written notice by the landlord shall contain, in substantially the same form, the following:

"State law permits former tenants to reclaim abandoned personal property left at the former address of the tenant, subject to certain conditions. You may or may not be able to reclaim property without incurring additional costs, depending on the cost of storing the property and the length of time before it is reclaimed. In general, these costs will be lower the sooner you contact your former landlord after being notified that property belonging to you was left behind after you moved out."

(2) Based on the inspection, the landlord shall give the tenant an itemized statement specifying repairs or cleanings that are proposed to be the basis of any deductions from the security the landlord intends to make pursuant to paragraphs (1) to (4), inclusive, of subdivision (b). This statement shall also include the texts of paragraphs (1) to (4), inclusive, of subdivision (b). The statement shall be given to the tenant, if the tenant is present for the inspection, or shall be left inside the premises.

(3) The tenant shall have the opportunity during the period following the initial inspection until termination of the tenancy to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security.

(4) Nothing in this subdivision shall prevent a landlord from using the security for deductions itemized in the statement provided for in paragraph (2) that were not cured by the tenant so long as the deductions are for damages authorized by this section.

(5) Nothing in this subdivision shall prevent a landlord from using the security for any purpose specified in paragraphs (1) to (4), inclusive, of subdivision (b) that occurs between completion of the initial inspection and termination of the tenancy or was not identified during the initial inspection due to the presence of a tenant's possessions.

(g)(1) No later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy under Section 1946 or 1946.1, Section 1161 of the Code of Civil Procedure, or not earlier than 60 calendar days prior to the expiration of a fixed-term lease, the landlord shall furnish the tenant, by personal delivery or by first-class mail, postage prepaid, a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security, and shall return any remaining portion of the security to the tenant. After either the landlord or the tenant provides notice to terminate the tenancy, the landlord and tenant may mutually agree to have the landlord deposit any remaining portion of the security deposit electronically to a bank account or other financial institution designated by the tenant. After either the landlord or the tenant provides notice to terminate the tenancy, the landlord and the tenant may also agree to have the landlord provide a copy of the itemized statement along with the copies required by paragraph (2) to an email account provided by the tenant.

(2) Along with the itemized statement, the landlord shall also include copies of documents showing charges incurred and deducted by the landlord to repair or clean the premises, as follows:

(A) If the landlord or landlord's employee did the work, the itemized statement shall reasonably describe the work performed. The itemized statement shall include the time spent and the reasonable hourly rate charged.

(B) If the landlord or landlord's employee did not do the work, the landlord shall provide the tenant a copy of the bill, invoice, or receipt supplied by the person or entity performing the work. The itemized statement shall provide the tenant with the name, address, and telephone number of the person or entity, if the bill, invoice, or receipt does not include that information.

(C) If a deduction is made for materials or supplies, the landlord shall provide a copy of the bill, invoice, or receipt. If a particular material or supply item is purchased by the landlord on an ongoing basis, the landlord may document the cost of the item by providing a copy of a bill, invoice, receipt, vendor price list, or other vendor document that reasonably documents the cost of the item used in the repair or cleaning of the unit.

(3) If a repair to be done by the landlord or the landlord's employee cannot reasonably be completed within 21 calendar days after the tenant has vacated the premises, or if the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession within 21 calendar days after the tenant has vacated the premises, the landlord may deduct the amount of a good faith estimate of the charges that will be incurred and provide that estimate with the itemized statement. If the reason for the estimate is because the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession, the itemized statement shall include the name, address, and telephone number of the person or entity. Within 14 calendar days of completing the repair or receiving the documentation, the landlord shall complete the requirements in paragraphs (1) and (2) in the manner specified.

(4) The landlord need not comply with paragraph (2) or (3) if either of the following applies:

(A) The deductions for repairs and cleaning together do not exceed one hundred twenty-five dollars ($125).

(B) The tenant waived the rights specified in paragraphs (2) and (3). The waiver shall only be effective if it is signed by the tenant at the same time or after a notice to terminate a tenancy under Section 1946 or 1946.1 has been given, a notice under Section 1161 of the Code of Civil Procedure has been given, or no earlier than 60 calendar days prior to the expiration of a fixed-term lease. The waiver shall substantially include the text of paragraph (2).

(5) Notwithstanding paragraph (4), the landlord shall comply with paragraphs (2) and (3) when a tenant makes a request for documentation within 14 calendar days after receiving the itemized statement specified in paragraph (1). The landlord shall comply within 14 calendar days after receiving the request from the tenant.

(6) Any mailings to the tenant pursuant to this subdivision shall be sent to the address provided by the tenant. If the tenant does not provide an address, mailings pursuant to this subdivision shall be sent to the unit that has been vacated.

(h) Upon termination of the landlord's interest in the premises, whether by sale, assignment, death, appointment of receiver, or otherwise, the landlord or the landlord's agent shall, within a reasonable time, do one of the following acts, either of which shall relieve the landlord of further liability with respect to the security held:

(1) Transfer the portion of the security remaining after any lawful deductions made under subdivision (e) to the landlord's successor in interest. The landlord shall thereafter notify the tenant by personal delivery or by first-class mail, postage prepaid, of the transfer, of any claims made against the security, of the amount of the security deposited, and of the names of the successors in interest, their addresses, and their telephone numbers. If the notice to the tenant is made by personal delivery, the tenant shall acknowledge receipt of the notice and sign his or her name on the landlord's copy of the notice.

(2) Return the portion of the security remaining after any lawful deductions made under subdivision (e) to the tenant, together with an accounting as provided in subdivision (g).

(i) Prior to the voluntary transfer of a landlord's interest in the premises, the landlord shall deliver to the landlord's successor in interest a written statement indicating the following:

(1) The security remaining after any lawful deductions are made.

(2) An itemization of any lawful deductions from any security received.

(3) His or her election under paragraph (1) or (2) of subdivision (h).

This subdivision does not affect the validity of title to the real property transferred in violation of this subdivision.

(j) (1) In the event of noncompliance with subdivision (h), the landlord's successors in interest shall be jointly and severally liable with the landlord for repayment of the security, or that portion thereof to which the tenant is entitled, when and as provided in subdivisions (e) and (g). A successor in interest of a landlord may not require the tenant to post any security to replace that amount not transferred to the tenant or successors in interest as provided in subdivision (h), unless and until the successor in interest first makes restitution of the initial security as provided in paragraph (2) of subdivision (h) or provides the tenant with an accounting as provided in subdivision (g).

(2) This subdivision does not preclude a successor in interest from recovering from the tenant compensatory damages that are in excess of the security received from the landlord previously paid by the tenant to the landlord.

(3) Notwithstanding this subdivision, if, upon inquiry and reasonable investigation, a landlord's successor in interest has a good faith belief that the lawfully remaining security deposit is transferred to him or her or returned to the tenant pursuant to subdivision (h), he or she is not liable for damages as provided in subdivision (l), or any security not transferred pursuant to subdivision (h).

(k) Upon receipt of any portion of the security under paragraph (1) of subdivision (h), the landlord's successors in interest shall have all of the rights and obligations of a landlord holding the security with respect to the security.

(l) The bad faith claim or retention by a landlord or the landlord's successors in interest of the security or any portion thereof in violation of this section, or the bad faith demand of replacement security in violation of subdivision (j), may subject the landlord or the landlord's successors in interest to statutory damages of up to twice the amount of the security, in addition to actual damages. The court may award damages for bad faith whenever the facts warrant that award, regardless of whether the injured party has specifically requested relief. In an action under this section, the landlord or the landlord's successors in interest shall have the burden of proof as to the reasonableness of the amounts claimed or the authority pursuant to this section to demand additional security deposits.

(m) No lease or rental agreement may contain a provision characterizing any security as "nonrefundable."

(n) An action under this section may be maintained in small claims court if the damages claimed, whether actual, statutory, or both, are within the jurisdictional amount allowed by Section 116.220 or 116.221 of the Code of Civil Procedure.

(o) Proof of the existence of and the amount of a security deposit may be established by any credible evidence, including, but not limited to, a canceled check, a receipt, a lease indicating the requirement of a deposit as well as the amount, prior consistent statements or actions of the landlord or tenant, or a statement under penalty of perjury that satisfies the credibility requirements set forth in Section 780 of the Evidence Code.

(p) The amendments to this section made during the 1985 portion of the 1985–86 Regular Session of the Legislature that are set forth in subdivision (e) are declaratory of existing law.

(q) The amendments to this section made during the 2003 portion of the 2003–04 Regular Session of the Legislature that are set forth in paragraph (1) of subdivision (f) are declaratory of existing law.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Civil Code section 1950.5(c) prohibits landlords from collecting a security deposit in excess of two month's rent for unfurnished residential property or three month's rent for furnished residential property. As a result, landlords cannot collect an additional "pet security." As a result, many landlords discriminate against tenants with pets, especially tenants with large dogs.

As an alternative, landlords can charge extra "pet rent." However, these fees are essentially non-refundable. It is more desirable to allow a landlord to collect pet security because the tenant will be motivated to keep the rental property clean and undamaged so that the landlord can refund the security at the end of the tenancy.

Civil Code section 54.2 prohibits landlords from collecting pet securities for guide dogs, signal dogs, and service dogs. However, section 54.2 does hold tenant owners of guide dogs, signal dogs, and service dogs liable for any damages caused by the dog.

The Solution: This resolution would allow landlords to collect pet security, for the purposes of cleaning and repairs only, due to damage that was caused by the pet or pets. The resolution refers to the exceptions in Civil Code section 54.2 that prohibit landlords from collecting securities for individuals with guide dogs, signal dogs, or service dogs and it also defines the term "pet security."

For example, if a pet leaves urine stains in the carpet, professional carpet cleaning services can use an ultra-violet light, also known as a "black light," to locate the stains and then the technicians can apply an enzyme treatment to the carpet to break down the urine. When such treatment is applied, it may be possible to restore the carpet without having to replace the carpet.

If landlords are allowed to collect pet securities, in addition to collecting traditional securities, then more landlords will be willing to allow tenants with pets to rent their residential properties.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
AB 383 (Wagner, 2013. Maintenance of the codes.), section 12, which amended Civil Code section 1950.5.

AB 1709 (Gallagher, 2016), amended Civil Code section 54.2 by replacing the term "hearing impaired" with the term "hard of hearing."

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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

RESOLUTION 07-03-2019

DIGEST
Landlord-Tenant Law: Penalty for Retaining Security Deposit in Bad Faith
Amends Civil Code section 1950.5 to increase the penalty for withholding a security deposit in bad faith from two to five times the deposit.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 1950.5 to increase the penalty for withholding a security deposit in bad faith from two to five times the deposit. The resolution should be approved in principle because increasing the penalty will serve as a deterrent to improperly withheld security deposits in the light of the current statute's ineffectual nature.

Current law provides that a court may award double damages where a landlord withholds a security deposit in bad faith. (Civ. Code, § 1950.5, subd. (*l*).) This penalty was increased from $600 to double the amount of the security deposit by the Legislature in 2002 to address abuses by landlords with respect to tenant deposits. (*Ibid*.; Assem. Bill No. 2330 (Reg. Sess. 2001-2002).)

This resolution proposes to increase the penalty amount to five times the amount of the deposit. "Civil penalties are inherently regulatory, not remedial," and are intended to secure obedience "to statutes and regulations validly adopted under the police power." (*People v. Union Pacific Railroad Co.* (2006) 141 Cal.App.4th 1228, 1257-1258.) As long as the enactment of the penalty is "procedurally fair and reasonably related to a proper legislative goal," the courts will not second-guess the decision to impose civil penalties or examine the possibility of less drastic alternatives. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) The principal limits on the Legislature's authority are the due process clauses of the federal and state constitutions, which bar "'oppressive' or 'unreasonable' statutory penalties." (*Id.* at 399.) Courts examine whether a penalty provision, on its face or as applied in a specific case, imposes a penalty that exceeds these limits. (*Id*.)

Here, the proposed revision still leaves the decision to impose the penalty to the sound discretion of the court, and still requires proof of bad faith on the part of the landlord, in order for the award to be made. Although the increase from twice the value of the deposit to five times the value of the deposit is a significant increase, the imposition of the higher penalty would discourage regular attempts by landlords to withhold deposits on the flimsiest of excuses. There are no verified studies with respect to whether the 2002 increase operated to curb landlord abuse. Nonetheless, it is apparent that tenants continue to battle landlords for the return of their deposits as any small claims judge can attest. An increase in bad faith penalties may well curb this ongoing abuse.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Civil Code section 1950.5 to read as follows:

§1950.5

(a) This section applies to security for a rental agreement for residential property that is used as the dwelling of the tenant.

(b) As used in this section, "security" means any payment, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge, except as provided in Section 1950.6, that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment of rent.

(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.

(3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy. The amendments to this paragraph enacted by the act adding this sentence shall apply only to tenancies for which the tenant's right to occupy begins after January 1, 2003.

(4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement.

(c) A landlord may not demand or receive security, however denominated, in an amount or value in excess of an amount equal to two months' rent, in the case of unfurnished residential property, and an amount equal to three months' rent, in the case of furnished residential property, in addition to any rent for the first month paid on or before initial occupancy.

This subdivision does not prohibit an advance payment of not less than six months' rent if the term of the lease is six months or longer.

This subdivision does not preclude a landlord and a tenant from entering into a mutual agreement for the landlord, at the request of the tenant and for a specified fee or charge, to make structural, decorative, furnishing, or other similar alterations, if the alterations are other than cleaning or repairing for which the landlord may charge the previous tenant as provided by subdivision (e).

(d) Any security shall be held by the landlord for the tenant who is party to the lease or agreement. The claim of a tenant to the security shall be prior to the claim of any creditor of the landlord.

(e) The landlord may claim of the security only those amounts as are reasonably necessary for the purposes specified in subdivision (b). The landlord may not assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

(f) (1) Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord shall notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection. The requirements of this subdivision do not apply when the tenancy is terminated

pursuant to subdivision (2), (3), or (4) of Section 1161 of the Code of Civil Procedure. At a reasonable time, but no earlier than two weeks before the termination or the end of lease date, the landlord, or an agent of the landlord, shall, upon the request of the tenant, make an initial inspection of the premises prior to any final inspection the landlord makes after the tenant has vacated the premises. The purpose of the initial inspection shall be to allow the tenant an opportunity to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security. If a tenant chooses not to request an initial inspection, the duties of the landlord under this subdivision are discharged. If an inspection is requested, the parties shall attempt to schedule the inspection at a mutually acceptable date and time. The landlord shall give at least 48 hours' prior written notice of the date and time of the inspection if either a mutual time is agreed upon, or if a mutually agreed time cannot be scheduled but the tenant still wishes an inspection. The tenant and landlord may agree to forgo the 48-hour prior written notice by both signing a written waiver. The landlord shall proceed with the inspection whether the tenant is present or not, unless the tenant previously withdrew his or her request for the inspection. Written notice by the landlord shall contain, in substantially the same form, the following:

"State law permits former tenants to reclaim abandoned personal property left at the former address of the tenant, subject to certain conditions. You may or may not be able to reclaim property without incurring additional costs, depending on the cost of storing the property and the length of time before it is reclaimed. In general, these costs will be lower the sooner you contact your former landlord after being notified that property belonging to you was left behind after you moved out."

(2) Based on the inspection, the landlord shall give the tenant an itemized statement specifying repairs or cleanings that are proposed to be the basis of any deductions from the security the landlord intends to make pursuant to paragraphs (1) to (4), inclusive, of subdivision (b). This statement shall also include the texts of paragraphs (1) to (4), inclusive, of subdivision (b). The statement shall be given to the tenant, if the tenant is present for the inspection, or shall be left inside the premises.

(3) The tenant shall have the opportunity during the period following the initial inspection until termination of the tenancy to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security.

(4) Nothing in this subdivision shall prevent a landlord from using the security for deductions itemized in the statement provided for in paragraph (2) that were not cured by the tenant so long as the deductions are for damages authorized by this section.

(5) Nothing in this subdivision shall prevent a landlord from using the security for any purpose specified in paragraphs (1) to (4), inclusive, of subdivision (b) that occurs between completion of the initial inspection and termination of the tenancy or was not identified during the initial inspection due to the presence of a tenant's possessions.

(g)(1) No later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy under Section 1946 or 1946.1, Section 1161 of the Code of Civil Procedure, or not earlier than 60 calendar days prior to the expiration of a fixed-term lease, the landlord shall furnish the tenant, by personal delivery or by first-class mail, postage prepaid, a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security, and shall return any remaining portion of the security to the tenant.

After either the landlord or the tenant provides notice to terminate the tenancy, the landlord and tenant may mutually agree to have the landlord deposit any remaining portion of the security deposit electronically to a bank account or other financial institution designated by the tenant. After either the landlord or the tenant provides notice to terminate the tenancy, the landlord and the tenant may also agree to have the landlord provide a copy of the itemized statement along with the copies required by paragraph (2) to an email account provided by the tenant.

(2) Along with the itemized statement, the landlord shall also include copies of documents showing charges incurred and deducted by the landlord to repair or clean the premises, as follows:

(A) If the landlord or landlord's employee did the work, the itemized statement shall reasonably describe the work performed. The itemized statement shall include the time spent and the reasonable hourly rate charged.

(B) If the landlord or landlord's employee did not do the work, the landlord shall provide the tenant a copy of the bill, invoice, or receipt supplied by the person or entity performing the work. The itemized statement shall provide the tenant with the name, address, and telephone number of the person or entity, if the bill, invoice, or receipt does not include that information.

(C) If a deduction is made for materials or supplies, the landlord shall provide a copy of the bill, invoice, or receipt. If a particular material or supply item is purchased by the landlord on an ongoing basis, the landlord may document the cost of the item by providing a copy of a bill, invoice, receipt, vendor price list, or other vendor document that reasonably documents the cost of the item used in the repair or cleaning of the unit.

(3) If a repair to be done by the landlord or the landlord's employee cannot reasonably be completed within 21 calendar days after the tenant has vacated the premises, or if the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession within 21 calendar days after the tenant has vacated the premises, the landlord may deduct the amount of a good faith estimate of the charges that will be incurred and provide that estimate with the itemized statement. If the reason for the estimate is because the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession, the itemized statement shall include the name, address, and telephone number of the person or entity. Within 14 calendar days of completing the repair or receiving the documentation, the landlord shall complete the requirements in paragraphs (1) and (2) in the manner specified.

(4) The landlord need not comply with paragraph (2) or (3) if either of the following applies:

(A) The deductions for repairs and cleaning together do not exceed one hundred twenty-five dollars ($125).

(B) The tenant waived the rights specified in paragraphs (2) and (3). The waiver shall only be effective if it is signed by the tenant at the same time or after a notice to terminate a tenancy under Section 1946 or 1946.1 has been given, a notice under Section 1161 of the Code of Civil Procedure has been given, or no earlier than 60 calendar days prior to the expiration of a fixed-term lease. The waiver shall substantially include the text of paragraph (2).

(5) Notwithstanding paragraph (4), the landlord shall comply with paragraphs (2) and (3) when a tenant makes a request for documentation within 14 calendar days after receiving the itemized statement specified in paragraph (1). The landlord shall comply within 14 calendar days after receiving the request from the tenant.

(6) Any mailings to the tenant pursuant to this subdivision shall be sent to the address provided by the tenant. If the tenant does not provide an address, mailings pursuant to this subdivision shall be sent to the unit that has been vacated.

(h) Upon termination of the landlord's interest in the premises, whether by sale, assignment, death, appointment of receiver, or otherwise, the landlord or the landlord's agent shall, within a reasonable time, do one of the following acts, either of which shall relieve the landlord of further liability with respect to the security held:

(1) Transfer the portion of the security remaining after any lawful deductions made under subdivision (e) to the landlord's successor in interest. The landlord shall thereafter notify the tenant by personal delivery or by first-class mail, postage prepaid, of the transfer, of any claims made against the security, of the amount of the security deposited, and of the names of the successors in interest, their addresses, and their telephone numbers. If the notice to the tenant is made by personal delivery, the tenant shall acknowledge receipt of the notice and sign his or her name on the landlord's copy of the notice.

(2) Return the portion of the security remaining after any lawful deductions made under subdivision (e) to the tenant, together with an accounting as provided in subdivision (g).

(i) Prior to the voluntary transfer of a landlord's interest in the premises, the landlord shall deliver to the landlord's successor in interest a written statement indicating the following:

(1) The security remaining after any lawful deductions are made.

(2) An itemization of any lawful deductions from any security received.

(3) His or her election under paragraph (1) or (2) of subdivision (h).

This subdivision does not affect the validity of title to the real property transferred in violation of this subdivision.

(j)(1) In the event of noncompliance with subdivision (h), the landlord's successors in interest shall be jointly and severally liable with the landlord for repayment of the security, or that portion thereof to which the tenant is entitled, when and as provided in subdivisions (e) and (g). A successor in interest of a landlord may not require the tenant to post any security to replace that amount not transferred to the tenant or successors in interest as provided in subdivision (h), unless and until the successor in interest first makes restitution of the initial security as provided in paragraph (2) of subdivision (h) or provides the tenant with an accounting as provided in subdivision (g).

(2) This subdivision does not preclude a successor in interest from recovering from the tenant compensatory damages that are in excess of the security received from the landlord previously paid by the tenant to the landlord.

(3) Notwithstanding this subdivision, if, upon inquiry and reasonable investigation, a landlord's successor in interest has a good faith belief that the lawfully remaining security deposit is transferred to him or her or returned to the tenant pursuant to subdivision (h), he or she is not liable for damages as provided in subdivision (l), or any security not transferred pursuant to subdivision (h).

(k) Upon receipt of any portion of the security under paragraph (1) of subdivision (h), the landlord's successors in interest shall have all of the rights and obligations of a landlord holding the security with respect to the security.

(l) The bad faith claim or retention by a landlord or the landlord's successors in interest of the security or any portion thereof in violation of this section, or the bad faith demand of replacement security in violation of subdivision (j), may subject the landlord or the landlord's successors in interest to statutory damages of up to ~~twice~~ five times the amount of the security,

in addition to actual damages. The court may award damages for bad faith whenever the facts warrant that award, regardless of whether the injured party has specifically requested relief. In an action under this section, the landlord or the landlord's successors in interest shall have the burden of proof as to the reasonableness of the amounts claimed or the authority pursuant to this section to demand additional security deposits.

(m) No lease or rental agreement may contain a provision characterizing any security as "nonrefundable."

(n) An action under this section may be maintained in small claims court if the damages claimed, whether actual, statutory, or both, are within the jurisdictional amount allowed by Section 116.220 or 116.221 of the Code of Civil Procedure.

(o) Proof of the existence of and the amount of a security deposit may be established by any credible evidence, including, but not limited to, a canceled check, a receipt, a lease indicating the requirement of a deposit as well as the amount, prior consistent statements or actions of the landlord or tenant, or a statement under penalty of perjury that satisfies the credibility requirements set forth in Section 780 of the Evidence Code.

(p) The amendments to this section made during the 1985 portion of the 1985–86 Regular Session of the Legislature that are set forth in subdivision (e) are declaratory of existing law.

(q) The amendments to this section made during the 2003 portion of the 2003–04 Regular Session of the Legislature that are set forth in paragraph (1) of subdivision (f) are declaratory of existing law.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Existing law has failed to prevent landlords from improperly withholding a portion of all of tenants' security deposits for items that are covered by ordinary wear and tear or otherwise should not have been deducted. The process for formally disputing a security deposit refund (or lack thereof) requires that formal notice be provided by certified mail and the tenants filing and pursuing the claim in small claims court. Because the maximum amount that may be recovered is only twice the security deposit in addition to whatever amount was improperly withheld, tenants are too often disincentivized to pursue landlords who regularly engage in unfair practices and improper withholding of security deposits. This is especially true where multiple tenants lived together and must collectively decide whether to proceed in the hopes of obtaining a fraction of the recovery, if any.

The Solution: By increasing the maximum penalty for improperly withholding a security deposit, this will help incentivize tenants whose deposit has been improperly withheld and increase the incentive for landlords to only withhold funds from the security deposit that cover damages beyond reasonable wear and tear to a rental unit.

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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RESOLUTION 07-04-2019

DIGEST
Attorneys' Fees: Statutory Attorneys' Fees Regarding Excavation
Amends Civil Code section 832 to add a statutory attorneys' fees clause in cases where excavating landowners cause damage to neighboring property.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 832 to add a statutory attorneys' fees clause in cases where excavating landowners cause damage to neighboring property. This resolution should be disapproved because it is overly broad in its application and creates a mandatory attorney fee award regardless of whether the offending excavator had a reasonable defense as to whether ordinary care and skill was used or whether reasonable precautions were taken.

Under existing law, an owner or lessee of land has an obligation to give notice to adjacent landowners of plans to excavate for the purposes of construction or improvement, to use ordinary care and skill, and to take reasonable precautions to avoid damaging adjacent land. (Civ. Code, § 832.)

This resolution would make attorney fee awards mandatory in cases where excavating landowners cause damage to neighboring property, without determining whether the excavator used ordinary skill, or whether reasonable precautions were taken. While it may not be cost effective to pursue litigation to enforce the strict liability nature of this statute, this resolution would simply shift the balance of power to the adjacent land owner without an evaluation as to whether the excavator used ordinary care and skill, or reasonable precautions.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 832 as follows:

§832

(a) Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, under the following conditions:

1. Any owner of land or his lessee intending to make or to permit an excavation shall give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating the depth to which such excavation is intended to be made, and when the excavating will begin.

2. In making any excavation, ordinary care and skill shall be used, and reasonable precautions taken to sustain the adjoining land as such, without regard to any building or other structure which may be thereon, and there shall be no liability for damage done to any such building or other structure by reason of the excavation, except as otherwise provided or allowed by law.

3. If at any time it appears that the excavation is to be of a greater depth than are the walls or foundations of any adjoining building or other structure, and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure must be allowed at least 30 days, if he so desires, in which to take measures to protect the same from any damage, or in which to extend the foundations thereof, and he must be given for the same purposes reasonable license to enter on the land on which the excavation is to be or is being made.

4. If the excavation is intended to be or is deeper than the standard depth of foundations, which depth is defined to be a depth of nine feet below the adjacent curb level, at the point where the joint property line intersects the curb and if on the land of the coterminous owner there is any building or other structure the wall or foundation of which goes to standard depth or deeper then the owner of the land on which the excavation is being made shall, if given the necessary license to enter on the adjoining land, protect the said adjoining land and any such building or other structure thereon without cost to the owner thereof, from any damage by reason of the excavation, and shall be liable to the owner of such property for any such damage, excepting only for minor settlement cracks in buildings or other structures.

(b) An owner of land or lessee who either fails to provide the notice required in subsections (a)(1) and (a)(3) or who fails to use ordinary care as required by subsection (a)(2) and causes damage to a coterminous owner's land or structure(s) under (a)(4) shall also be liable for attorneys' fees and costs incurred in any dispute regarding damage to the coterminous owner's land or structure(s).

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Adjacent land owners depend on each other's land for lateral and subjacent support of the structures on one's own land. A neighbor who needs to excavate on their own property must give notice to adjacent landowners of certain kinds of excavation to allow the neighbors to shore up their own property to protect against damage to their own land or structures. Currently, Section 832 provides for strict liability for the excavating party who causes damage to their neighbor's property, save for minor settlement cracks. However, parties can differ wildly as to whether certain cracks in the non-excavating neighbor's structure were pre-existing or qualify as "minor settlement cracks," thus inviting litigation over the nature of such cracks. An unscrupulous land developer can begin excavating on their property without giving proper notice to the neighboring properties or proper support of neighboring land and simply choose to litigate damages, even if it is clear that liability exists. The litigation over the extent of the damages can overtake the cost of repairing the damage to property in the first place, thereby eviscerating the protections that section 832 seeks to afford.

The Solution: Civil Code Section 832 should have teeth in the shape of a statutory attorneys' fees clause in order to dissuade a more financially robust neighbor from aggressively litigating damages when liability is clear. The parties are still free to litigate damages, but then have to consider whether the squabbling over the size of the cracks is worth the exposure to the opponents' attorneys' fees. The existence of a statutory attorneys' fees clause would encourage settlement earlier and promote neighborhood harmony such that the neighbors whose home has already been damaged would not then be subject to years of expensive litigation against their adjoining land owner.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule.

CURRENT OR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Katy M. Young

RESOLUTION 07-05-2019

DIGEST
Eminent Domain: Appraisal Costs
Amends Code of Civil Procedure section 1263.025 to clarify that a "condemning agency" is responsible for reasonable appraisal costs in eminent domain proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1263.025 to clarify that a "condemning agency" is responsible for reasonable appraisal costs in eminent domain proceedings. This resolution should be approved in principle because it clarifies existing law to make eminent domain appraisals equally available in all circumstances.

Code of Civil Procedure section 1235.190, subdivision (a), requires only a "public entity" to pay up to $5,000 toward a property owner's independent appraisal of the property to be condemned. Code of Civil Procedure section 1235.190 defines "public entity" to include the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

However, condemnation proceedings are not always brought by a "public entity." As the proponent notes, sometimes private companies with the power of eminent domain, like utility companies, may not be included in the definition of "public entity." (See, e.g., *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280.) There is no reason a private utility company should not be subject to the same rules as a government utility because the private company is providing identical services and performing the same functions as a public entity in those situations. Changing the term "public entity" to "condemning agency" would broaden the scope of the required $5,000 payment and make eminent domain appraisals equally available in all circumstances.

The resolution, however, does not define "condemning agency," and as such may inadvertently create uncertainty in an area of law that is currently certain. Therefore, if this resolution is considered by the Legislature, it should be amended to add a definition for "condemning agency."

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1263.025, to read as follows:

1 §1263.025

(a) A ~~public entity~~ condemning agency shall offer to pay the reasonable costs, not to exceed five thousand dollars ($5,000), of an independent appraisal ordered by the owner of a property that the public entity offers to purchase under a threat of eminent domain, at the time the public entity makes the offer to purchase the property. The independent appraisal shall be conducted by an appraiser licensed by the Office of Real Estate Appraisers.

(b) For purposes of this section, an offer to purchase a property "under a threat of eminent domain" is an offer to purchase a property pursuant to any of the following:

(1) Eminent domain.

(2) Following adoption of a resolution of necessity for the property pursuant to Section 1240.040

(3) Following a statement that the ~~public entity~~ condemning agency may take the property by eminent domain.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Current law requires payment of reasonable appraisal costs, not to exceed $5,000, for an independent appraisal ordered by the owner of property subject to condemnation through eminent domain. However, Code of Civil Procedure section 1263.025 currently limits the requirement to a condemning "public entity" which means that private companies with the power of eminent domain, like utility companies, may not be included.

The Solution: By expanding the language from "public entity" to "condemning agency", all entities vested with the power of eminent domain will be required to compensate owners for the reasonable costs of an independent appraisal.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Karen Frostrom

RESOLUTION 07-06-2019

DIGEST
Landlord Tenant: Modification of Permitted Landlord Entry on Premises
Amends Civil Code section 1954 to permit prospective recipients of real property to enter real property with adequate notice.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 1954 to permit prospective recipients of real property to enter real property with adequate notice. This resolution should be disapproved because it is overbroad in that it extends a right of entry to individuals who have no present interest in the property to which access is sought.

Under current law, a beneficiary who has a vested interest in real property has a current interest in that property. (See *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1062.) Allowing a right of entry to that property for the purposes of inspection, management, or maintenance could therefore be pertinent to protecting that present interest. A vested beneficiary also has the right to receive an accounting under Probate Code section 16062, which contingent beneficiaries, donees or devisees do not have. A beneficiary with a contingent interest, as well as donees and devisees however, only have an interest in the property if certain circumstances are met in the future, but they do not have this interest now.

Non-vested beneficiaries can obtain information about the property in other ways. For example, Probate Code section 16061 allows a beneficiary to obtain information from the trustee of the estate upon "reasonable request," though the term "reasonable request" has not been specifically defined in case law.

This resolution has the unintended consequence of extending the right of entry to individuals who have no present interest in the property. However, that opens the door, both literally and figuratively, to too many individuals. It is further problematic to place a landlord in the position of determining who may or may not be a vested or contingent beneficiary, devisee or donee.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 1954 as follows:

§1954
(a) A landlord may enter the dwelling unit only in the following cases:
(1) In case of emergency.

(2) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual: purchasers, mortgagees, tenants, workers, or contractors, vested or contingent beneficiaries, devisees, or donees, or to make an inspection pursuant to subdivision (f) of Section 1950.5.

(3) When the tenant has abandoned or surrendered the premises.

(4) Pursuant to court order.

(5) For the purposes set forth in Chapter 2.5 (commencing with Section 1954.201).

(6) To comply with the provisions of Article 2.2 (commencing with Section 17973) of Chapter 5 of Part 1.5 of Division 13 of the Health and Safety Code.

(b) Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents to an entry during other than normal business hours at the time of entry.

(c) The landlord may not abuse the right of access or use it to harass the tenant.

(d) (1) Except as provided in subdivision (e), or as provided in paragraph (2) or (3), the landlord shall give the tenant reasonable notice in writing of his or her intent to enter and enter only during normal business hours. The notice shall include the date, approximate time, and purpose of the entry. The notice may be personally delivered to the tenant, left with someone of a suitable age and discretion at the premises, or, left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover the notice. Twenty-four hours shall be presumed to be reasonable notice in absence of evidence to the contrary. The notice may be mailed to the tenant. Mailing of the notice at least six days prior to an intended entry is presumed reasonable notice in the absence of evidence to the contrary.

(2) If the purpose of the entry is to exhibit the dwelling unit to prospective or actual purchasers, the notice may be given orally, in person or by telephone, if the landlord or his or her agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale and that the landlord or agent may contact the tenant orally for the purpose described above. Twenty-four hours is presumed reasonable notice in the absence of evidence to the contrary. The notice shall include the date, approximate time, and purpose of the entry. At the time of entry, the landlord or agent shall leave written evidence of the entry inside the unit.

(3) The tenant and the landlord may agree orally to an entry to make agreed repairs or supply agreed services. The agreement shall include the date and approximate time of the entry, which shall be within one week of the agreement. In this case, the landlord is not required to provide the tenant a written notice.

(e) No notice of entry is required under this section:

(1) To respond to an emergency.

(2) If the tenant is present and consents to the entry at the time of entry.

(3) After the tenant has abandoned or surrendered the unit.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Current law only permits the entry of a landlord onto the premises, without the consent of the tenant, in certain circumstances, absent a court order. While the list of situations

where entry is permitted is somewhat exhaustive, it does not allow for entry in situations where the transfer of ownership of the property may not be pursuant to a sale.

In addition to a sale, real property can be transferred by a gift and/or devise. In all situations, it is likely that the fiduciary will need to enter the premises to inspect the condition, in order to ensure proper administration of the estate. Current law does not permit such entry without either the consent of the tenants or the substantial expense of obtaining a court order.

Additionally, it is possible that either through the terms of the testamentary instrument or by dispute amongst the beneficiaries, in kind distributions of property can be made, effectively altering the dispositive scheme. Such distributions require beneficiaries to enter the premises to determine the condition to allow them to make an educated decision on whether they: (1) want the property, and (2) what value they will place on the property.

The Solution: One minor tweak to Civil Code section 1954 can alleviate all issues without placing any additional burden on the tenant. Adding prospective or actual recipients alleviates the issues preventing fiduciaries and beneficiaries from entering the premises to review the real property prior to receipt.

The proposed modification will not significantly adversely affect any tenants. The landlord is still prohibited from entering the premises without adequate notice and from entering during unreasonable hours. This modification will not place any improper burden on a tenant, but rather, eliminates a void preventing the adequate administration of estates.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None.

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RESOLUTION 07-07-2019

DIGEST
Homeowners Associations: Eliminates Consent Requirement for Electronic Notice Delivery
Amends Civil Code section 4040 to allow homeowners associations to deliver documents to members by email, facsimile or other electronic means without prior written consent.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 4040 to allow homeowners associations to deliver documents to members by email, facsimile or other electronic means without prior written consent. This resolution should be disapproved because a person should not be forced to accept important notices and documents, to which he or she is entitled, solely by email, facsimile or electronic means without formally agreeing to such a process.

Civil Code section 4040 provides a consistent guideline for individual notices to individual unit owners providing for traditional delivery by first class or certified mail, express mail or overnight delivery by an express service courier. It allows the recipient to opt out of such delivery by written consent. (*Ibid*.) A 2018 amendment to that section added email to the means by which the individual could opt out, but retained the requirement that the recipient opt in to the email approach in writing or by email. (Civ. Code, § 4040, subd. (a)(2).)

The stated purpose for the resolution is to save homeowner associations the cost of printing and delivering documents, reports and notice by mail or overnight delivery by an express service carrier, and those who prefer notices by email, facsimile or other electronic means, should be entitled to receive communications by those media. But despite its many benefits, electronic communication is not ideal for everyone.

Homeowners association notices are often significant and can affect the recipient's interest in the unit. Thus, it is necessary to ensure the notices are actually received in order to protect the recipients' due process rights. The assumption should not be made that each such recipient has the ability to receive and understand email, or even the desire to do so. The existing requirement that the recipient "opt in" enables individuals with such capabilities to do a simple consent. Positing a more complex "opt out" on the part of the less sophisticated recipient would increase the likelihood that appropriate notice would not be received, resulting in further due process concerns. In addition, it would likely make it more difficult for the association to prove actual receipt, particularly in the context of individual notices, which could include risk of monetary or property loss to the recipient if not timely acted upon.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add Civil Code section 4040, to read as follows:

§4040

(a) If a provision of this act requires that an association deliver a document by "individual delivery" or "individual notice," the document shall be delivered by one of the following methods:

(1) First-class mail, postage prepaid, registered or certified mail, express mail, or overnight delivery by an express service carrier. The document shall be addressed to the recipient at the address last shown on the books of the association.

(2) Email, facsimile, or other electronic means~~, if the recipient has consented, in writing or by email, to that method of delivery. The consent may be revoked, in writing or by email, by the recipient~~.

(b) Upon receipt of a request by a member, pursuant to Section 5260, identifying a secondary address for delivery of notices of the following types, the association shall deliver an additional copy of those notices to the secondary address identified in the request:

(1) The documents to be delivered to the member pursuant to Article 7 (commencing with Section 5300) of Chapter 6.

(2) The documents to be delivered to the member pursuant to Article 2 (commencing with Section 5650) of Chapter 8, and Section 5710.

(c) For the purposes of this section, an unrecorded provision of the governing documents providing for a particular method of delivery does not constitute agreement by a member to that method of delivery.

(Proposed language to be added underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Civil Code section 4040(a)(2) in its current form only allows Homeowners Associations (HOAs) to deliver required, routine information to Members via email "if the recipient has consented." For example, HOAs are required to deliver multiple-page documents to the Members every year. Civil Code section 5300 requires every HOA to "distribute an annual budget report" to the Members, and Civil Code section 5310 requires every HOA to "distribute an annual policy statement" to the Members. HOAs also routinely deliver copies of board meeting agendas and board meeting minutes (when requested). Compliance with section 4040(a)(2) as currently written can be, and usually is unnecessarily costly. The cost of printing and postage can in many instances run into the thousands of dollars.

The Solution: If HOAs had the option to send routine financial reports, policy statements, and board meeting agendas and minutes by email, then the delivery costs would be minimal. This resolution would allow HOAs to deliver such routine documents by email or by printing hard

copies and sending them by U.S. mail. If a Member wants a "hard copy" of an HOA document, the Member can easily print out a hard copy from a pdf file that will be delivered by email, facsimile or other electronic means. In addition, if a Member does not have access to a personal computer with a printer, the Member can contact the HOA's property manager and make arrangements to pay for the printing and mailing costs. *See* Civil Code section 5205(f), which allows the HOA to "bill the requesting member for the direct and actual cost of copying and mailing requested documents." *See also* section 5220, which allows a Member to receive information through the "alternative process described in subdivision (c) of section 8330 of the Corporations Code."

Further, the Civil Code has special delivery requirements for documents about "Member Election" (including elections for assessments and amendments to the governing documents) in sections 5100-5145, "Assessment Payment and Delinquency," in sections 5850-5985, and "Dispute Resolution and Enforcement," in sections 5850-5985. This resolution would not affect those special requirements.

When delivering routine required documents to the Members, Homeowners Associations should be allowed to provide the documents by email, facsimile, other electronic means, or U.S. mail. If certain Members refuse to provide their email addresses, Civil Code section 5205(f), under "Record Inspection," allows Associations to charge Members fees for the associated printing and mailing costs before the documents are delivered.

CURRENT OR PRIOR RELATED LEGISLATION
SB 261 (Roth, 2018), which amended Civil Code section 4040.

IMPACT STATEMENT:
The resolution does not affect any other law, statute or rule other than those expressly identified.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Civil Code section 4040 is not limited to delivery of "routine documents". Many people ignore emails due to the number received daily. Some people have disconnected their fax or changed fax number or email addresses. Saving money and paper are reasonable goals but not if the homeowner does not consent to receiving notice via fax, email or other electronic means.

OCBA

"If the HOAs had the option to send routine financial reports, policy statements, and board meeting agendas and minutes by email," according to the Proponent, "then the delivery costs would be minimal." The problem with this resolution is that the statute already provides such an 890option -- by expressly permitting HOAs to obtain consent from homeowners to receive delivery by electronic or other alternate means. Hence, the proposed amendment to Civil Code Section 4040 is not necessary to provide the desired option.

Moreover, the potential harm from the change this resolution proposes far outweighs any possible cost savings. Indeed, this resolution seeks to take away *the option rightfully held by homeowners* to select the means of delivery most convenient for them, and thereby heightens the risk that important information will not be communicated to homeowners as required. Some homeowners -- particularly the elderly and disadvantaged -- do not have access to electronic mail or facsimile machines and would not receive notice of important information under this proposed resolution if and when the HOA unilaterally opts to use electronic delivery without their consent.

Furthermore, there is no good reason set forth in the resolution to support granting sole discretion to an HOA to decide to use alternative forms of delivery to send important information to their members. The desired cost savings can be achieved by simply communicating with HOA members and encouraging them to consent to delivery by other means. In the end, the homeowner's option to consent to an alternative manner of service exists (as it does in numerous areas of the law) to ensure proper notice is actually provided to homeowners. Civil Code Section 4040 is already carefully balanced to achieve that goal, while at the same time permitting the option for delivery by other means when appropriate.

For all of the foregoing reasons, this resolution is unnecessary and needlessly harmful to elderly and disadvantaged homeowners. Accordingly, the OCBA urges a "no" vote on this resolution.

RESOLUTION 07-08-2019

DIGEST
Homeowners Associations: Exclude Operating Rules Amendments from Secret Ballot Process
Amends Civil Code section 5100 to exclude elections regarding homeowners association's operating rules from the secret ballot requirements of that section.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 5100 to exclude elections regarding homeowners association's operating rules from the secret ballot requirements of that section. This resolution should be approved in principle because it eliminates an inconsistency in the statutory scheme, and the nature of the issues connected with operating rules is generally less serious and sometimes may require more rapid action than the balance of the issues articulated in the section.

Civil Code section 4360 provides a method for amendment of operating rules. It generally contemplates advance legal notice to the members of the proposed rule change, then board action at a board meeting after consideration of any comments made by association members. Operating rules are part of the governing documents of common interest developments. (Civ. Code, § 4150.) Section 5100, on the other hand, provides that elections regarding assessments which legally require a vote, the election and removal of directors, amendments to governing documents, or the grant of exclusive use of common areas, are to be held by secret ballot of the members.

The resolution seeks to eliminate an ambiguity arising from the fact that "operating rules" are included in section 4150's definition of "governing documents," such that a literal reading of section 5100 would appear to require that any change in the operating rules of the Common Interest Development would require a secret ballot. The resolution sensibly recognizes that "operating rules" are an integral component of the "governing documents," which should be exclusively governed by the procedural notices and protection of section 4360, and not section 5100. It harmonizes section 5100 with the notion that section 4360 governs amendment of the "operating rules," which is properly done through board action, as opposed to secret ballot of the owners.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Civil Code section 5100, to read as follows:

§5100

(a) Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, excluding any amendment of the operating rules, or the grant of exclusive use of common area pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article.

(b) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article.

(c) The provisions of this article apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents.

(d) The procedures set forth in this article shall apply to votes cast directly by the membership, but do not apply to votes cast by delegates or other elected representatives.

(e) In the event of a conflict between this article and the provisions of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the provisions of this article shall prevail.

(f) Directors shall not be required to be elected pursuant to this article if the governing documents provide that one member from each separate interest is a director.

(Proposed language to be added underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: There is a conflict between Civil Code sections 5050 and 4150. Section 5050 sets out a secret ballot process to amend all HOA governing documents, which include “operating rules.” In contrast, section 4150 sets out a less formal process to amend “operating rules.”

Civil Code section 4150 defines the term "governing documents" as:

> The declaration [Declaration of Covenants, Conditions, and Restrictions ("CC&Rs")] and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

As a result, "operating rules" are defined as one of several types of HOA "governing documents."

Sections 5100-5145, prescribe the procedures for HOA "Member Election," and specify the secret ballot requirements for such "member elections", and the requirements also apply to amending HOA "governing documents."

In contrast, section 4360 sets out informal notice and approval requirements to amend "operating rules." Section 4360 requires a 28 day notice period and allows the Board of Directors to approve amended operating rules at an open session of a subsequent Board Meeting without mailing of ballots to all Members and without a formal election.

The Solution: This resolution resolves the conflict between Civil Code section 5100 and section 4150 by excluding the amendment of "operating rules" from section 5100.

CURRENT OR PRIOR RELATED LEGISLATION
AB 569 (Chau, 2014), which amended Civil Code section 5100 for "Member Election."
SB 261 (Roth, 2018), which amended Civil Code section 4360 for "Operating Rules."

IMPACT STATEMENT
This resolution would not impact any other law.

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