

Recreational Use Immunity for Common Interest Developments

Do you worry about liability when you see people, who are neither owners nor residents, using your property for recreation? Are they using the common area walking or hiking paths? Playing on your lawns and playground? Skateboarding on your streets? Taking a short-cut to the beach? Here's some good news from attorneys, for a change, which should put your mind at ease.

Immunity from liability for Recreational Use of Association Property

The California Legislature, in its desire to promote and encourage owners of private property to allow the public to access their land for recreation purposes, has enacted statutes which give you, the property owner, immunity from liability.

In 1963, the Legislature enacted Civil Code section 8461, which provides that landowners are not required to and/or have no duty "to keep the premises safe for entry or use by others for any recreational purpose." Neither is it required "to give any warning of hazardous conditions, uses of structures, or activities" to those entering for recreation purposes.

Sure, it is true that "a landowner owes a duty of reasonable care to persons coming upon his land"2 But, Civil Code Section 846 provides an important exception to this rule, when the use is for recreational purposes. The exception applies even when the Association has been negligent. Section 846 allows and encourages owners or persons with an interest in property "to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits."3

Section 846 specifically provides that giving permission or allowing persons to use one's property for recreational purposes does not extend to the users any assurance that the premises are safe for recreational purposes. In other words, the owner is not liable when it allows strangers to the association to use the property for recreational purposes. If this sounds too good to be true, it is probably because there is a common misconception that owners of property are always liable to someone who gets hurt on their property. Not true. However, there are some parameters which apply to this immunity.

As you probably understand by now, it is key that the property is being used for recreational purposes. Section 846 provides a list of illustrative activities which qualify as recreational. The list includes hiking, camping,

water sports, horse back riding and even use of vehicles, such as snowmobiles and motorcycles, for recreational purposes. In 1978, the Legislature revised Section 846 to broaden recreational activities and changed the wording to “any recreational purpose.”⁴ Since that time, the courts have applied a very loose standard, finding even that children playing on farm equipment constituted a “recreational activity.” Other examples of recreational use findings in California case law include kite flying, tree climbing, picnicking, and skateboarding.⁵

With the possible exception of property which is an active construction site, immunity extends whether or not the land is of a type suitable for recreational activities. Neither is Section 846 immunity limited to land in its natural condition. No distinction between natural and artificial conditions is made in applying this statute.⁶ Yes, this immunity does apply to your swimming pool! However, it does not override the state and local ordinances requiring fences around pools.

There are only three instances in which the immunity provided by Section 846 does not shield from liability. The situations are:

1) Where an individual is “expressly invited, rather than merely permitted” to come on the premises, the immunity provided by Section 846 does not apply. The invitation need not specifically be for recreational purposes.⁷

2) Where there is consideration (fee) charged in exchange for permission to enter the property. Typically, the consideration is in the form of an entrance fee.⁸

3) Where there is “willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity”

So, if you charge outsiders a fee to use the common area property for recreation, you will no longer have the protection of this California statute. And if you expressly invite people to an event or to otherwise use your property, (such as guests who are invited to swim at the pool) you will similarly give up this immunity.

The third exception, for “willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity” must be more than negligence. “[I]n the context of tort liability . . . the usual meaning assigned to ‘willful,’ as well as to ‘wanton’ and to other similar terms is that ‘the [person] has intentionally done an act of unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.’” This same description has been used “to explain

when a failure to guard or warn against a dangerous condition has been 'willful or malicious' for the purposes of the recreational immunity statute"⁹

Liability can be established only when the injured person proves that the owner had (1) actual or constructive (should have known) knowledge of the danger, and (2) actual or constructive knowledge that injury is probable, not just possible, as a result of the danger, and (3) that the owner intentionally failed to do something about the danger.

Thus, if it is known by an association board, whether because of past accidents at a particular spot, or based on expert advice, that something on its property is unreasonably dangerous, and the board nevertheless knowingly fails to protect against the risk, then the immunity is lost.

An Easement Does Not Result from the Use for Recreational Purposes by the Public

An easement is an interest in the land of another which entitles the owner of the easement to a limited use and enjoyment of the owner's land. An easement may arise without the owner's permission, and without any written and recorded paperwork, when a property is adversely used by the public for at least five years. However, you do not have to worry about an easement being created when the public is traipsing across your association property to photograph your beautiful view of the city, launching its hang-gliders from your highest peak, or using your lovely paths and trees for bird watching.

Not only has the Legislature acted to shield a landowner from liability when it allows its property to be used for recreational purposes, in 1971 it enacted Civil Code section 1009 for the purpose of eliminating the threat that owners of real property will lose rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes.¹⁰ As a result, allowing the public to use property for recreational purposes does not create an easement, whereby the public can continue the use even after the owner wishes the public to discontinue using the property.

Beware, however, that as a result of the strong public policy of allowing public access to shoreline areas, there is an exception for ocean front and beach properties. The protections of Section 1009 do not apply to property which lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean and its harbors, estuaries, bays and inlets.¹¹ Public easements to access the beach through private property are often upheld by California courts. This does not mean that the landowner gives up the

recreational use immunity and becomes liable for injuries occurring on the property, but it does mean that an easement may develop.

It goes without saying (but we'll say it anyway) that your common area land should always be kept properly insured against liability risks as well as property damage. We should also note that it is often up to your attorney to raise this defense of recreational use immunity when the association is sued, as some personal injury attorneys are not aware of it and will bring a lawsuit for injuries occurring during recreational use of land.

Your association board can sleep easier knowing that it need not attempt to prevent non-owners or non-residents from using common area property for recreational purposes, in order to protect the Association from liability. As set forth above, an Association is shielded from liability, and from the loss of its property rights, when allowing the public access to its common area property for recreational purposes.

Sharon Glenn Pratt is founder of the law firm of Pratt & Associates, an ECHO member firm. She specializes in civil litigation, with extensive experience in community association law, including creation, amendment and enforcement of governing documents. Pat Wendleton also specializes in civil litigation, with substantial experience in community association construction defects and transactional law.

1 Civil Code Section 846 provides:

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether

possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

All further statutory references are to the Civil Code unless otherwise specified.

2 Civil Code section 1714.

3Johnson v. Unocal (1993) 21 Cal.app.4th 310, 315.

4Ornelas v. Randolph (1993) 4 Cal.4th 1095.

5Ornelas v. Randolph (1993) 4 Cal.4th 1095, Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal.app.4th 1110, Valladares v. Stone (1990) 218 Cal.app3d 363, Johnson v. Unocal (1993) 21 Cal.app.4th 310, Calhoon v. Lewis (2000) 81 Cal.App.4th 108

6Ornelas v. Randolph (1993) 4 Cal.4th 1095.

7Calhoon v. Lewis (2000) 81 Cal.app,4th 108.

8Miller v. Weitzen (2005) 133 Cal.App.4th 732.

9Manuel v. Pacific Gas and Electric Co. (2009) 2009 Cal.App. Lexis 719.

10 Civil Code section 1009 provides: (a) The Legislature finds that: 1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities.

(2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes.

(3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.

(b) Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to Section 813 of the Civil Code or has posted signs on such property pursuant to Section 1008 of the code, except as otherwise provided in subdivision (d), no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c).

11 Civil Code section 1009 (e), *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 465.

By: Pratt & Associates