D070194

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

GEORG LINGENBRINK, TRUSTEE OF THE PETRA KRISMER LIVING TRUST DATED APRIL 7, 2011,
Plaintiff and Respondent,
v.
DEL RAYO ESTATES HOMEOWNERS ASSOCIATION,
a California Corporation,
Defendant and Appellant,

APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY
CASE NO. 37-2013-00078036-CU-OR-NC
JACQUELINE M. STERN, JUDGE
TIMOTHY M. CASSERLY, JUDGE

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT & AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(California Rules of Court, Rule 8.208)

Pursuant to California Rules of Court, rule 8.208, Amicus Curiae Community Associations Institute, by and through its undersigned counsel of record, submits the following Certificate of Interested Parties or Persons:

I hereby certify that there are no interested entities or persons to list in this Certificate pursuant to California Rules of Court, rule 8.208(e)(3).

Dated: December 19, 2016

Respectfully submitted,

NORDBERG|DeNICHILO, LLP

By: 

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Table of Contents

Table of Authorities

Cases

Secondary Sources

Statutes

D070194

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to California Rules of Court, rule 8.200(c), Community Associations Institute ("CAI") respectfully requests permission to file the accompanying Amicus Curiae Brief ("Brief") in Support of Appellant, DEL RAYO ESTATES HOMEOWNERS

ASSOCIATION. CAI is familiar with the issues and submits that its Brief will materially assist the Court in resolving this matter.

Founded in 1973, CAI is a non-profit educational organization dedicated to building better communities. CAI's mission is to serve as a national voice for those involved in community associations, including homeowners, governing boards, service providers and vendors. CAI's primary purpose is to provide education and legislative assistance and to act as a clearing house for ideas and practices that encourage the successful operation and management of all types of residential community associations. To accomplish this goal, CAI offers seminars, workshops, and conferences, and publishes resource materials concerning management, governance, and operation of community associations. CAI also provides nationally recognized accreditation for community association managers, lawyers, reserve specialists, and insurance professionals.

CAI currently has more than 60 chapters worldwide, with approximately 34,000 members nationally that represent approximately 338,000 community associations and 68 million residents. Among these chapters is its California Chapter.

There are nearly 44,900 community associations of varying size and organizational structure within California, with an estimated 3.48 million homes in California alone. Thus, a significant portion of the California population relies upon associations and/or their managing agents that serve such associations for governance of their communities.

Moreover, to the extent that there will be increased costs or burdens associated with the interpretation or application of certain laws and/or decisional authority, the association homeowners will ultimately bear such costs or burdens. Thus, CAI, its members, and, literally, the millions of residents that live in California community associations have an interest in the outcome of this decision.

CAI submits its proposed Brief to assist this Court in deciding this matter to address the fundamental questions of wide-ranging significance to the associations in California raised by the Appellant and Respondents.

CAI urges the Court to recognize that the determination of a view blockage is subjective, and the decisions made by an association's Board of Directors, where made in good faith and

after reasonable inquiry and investigation should be subject to the rule of judicial deference.

For these reasons, CAI respectfully requests that the Court grant it leave to file the accompanying Amicus Curiae Brief that provides additional discussion of the fundamental reasons why the trial court's judgment in favor of Respondents and against Appellant's claims, and all of them, should be overturned and the rule of judicial deference be adopted when an association's board of directors have acted in compliance with the requirements of the business judgment rule in evaluating the enforcement a view blockage restriction.

Dated: December 19, 2016

Respectfully submitted,

NORDBERG|DeNICHILO, LLP

By: _____

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

Founded in 1973, proposed Amicus Curiae Community Associations Institute ("CAI") is a non-profit educational organization with its mission to serve as a national voice for those involved in community associations, including homeowners, governing boards, service providers and vendors. CAI's primary purpose is to provide education and legislative assistance and to act as a clearing house for ideas and practices that encourage the successful operation and management of all types of residential community associations.

While CAI has many chapters across the United States, its California Chapter serves many members who represent and service the over 44,900 associations of varying size and organizational structure within California. With an estimated 3.48 million units in California alone, there are, literally, many millions of California homeowners and residents who own and/or live in common interest developments and, therefore, rely upon associations and/or their managing agents that serve such associations for governance of their communities.

To the extent that the instant matter provides guidance for the thousands of community associations in the state in how to deal with and address view blockage issues CAI, its members, and the millions of California homeowners and residents who own and/or live in associations have an interest in the outcome of this decision, as well as any decision and/or legislation impacting our communities.

1. INTRODUCTION

As set forth in Appellant's Opening Brief, Defendant and Appellant Del Rayo Estates Homeowners Association (the "Association") is a nonprofit mutual benefit corporation that manages a common interest development in Rancho Santa Fe, California. (1 AA 39:5-7) Plaintiff and Respondent Georg Lingenbrink is the Trustee of the Petra Krismer Living Trust, which owns a residence in Del Rayo Estates and is therefore a member of Del Rayo Estates HOA. (1 AA 38:26-39:4)

The Association's CC&Rs include a provision that trees on any given lot are not supposed to reach a height that "interferes with the view" from another lot, and if they do, the owner of the

trees should trim or remove them (Section 3.1.26). (2 AA 175) The CC&Rs fail to provide any additional guidance as to what would constitute an "interference" with a view. It is CAI's position that in such cases, the Court should defer to the reasonable efforts of the Association's Board of Directors to determine if there is an "interference" with a view, and that the court should establish a rule that such decisions should be given deference when they are supported by a reasonable investigation, and made in good faith in a manner that is in the best interests of the association.

CAI agrees with Appellant's analysis of California law and further believes that Appellant's position creates the best public policy in terms of minimizing costs and avoids potential and repetitive litigation which could lead to absurd and inconsistent results (as will be explained below). Further, adopting such a rule will promote judicial economy and administration.

This Amicus Curiae Brief ("Brief") is filed to address the decisional authority that CAI contends supports Appellant's position. Further, the language, or similar variations of the language at issue in the CC&Rs in the case at issue is found in a large number of other CC&Rs recorded throughout the state. The

language is arguably ambiguous, and adopting a rule of judicial defference to provide guidance as to how to address this language would be of great benefit to CAI's many members and the homeowners throughout the State of California which would be negatively impacted were this Court to uphold the trial court's ruling and require Appellant to enforce the CC&Rs against the offending party (Pardee) when the Association itself ultimately did not find that there was an "interference" with Lingenbrink's view.

2. STATEMENT OF THE CASE AND FACTS

CAI incorporates the respective Statement of the Case and Statement of Facts set forth by the Appellant. Appellant's briefs set forth the relevant facts, allegations and procedure in more than sufficient detail for purposes of this brief.

3. ARGUMENT

a. Enforcement of the view restrictions such as that at issue falls within the corporate functions of the Association and a rule of judicial deference should be adopted in such matters.

Community associations, such as Appellant in this matter, serve many functions. They are often corporations, with bylaws, and boards of directors, and elections, and documents which can be amended by the members. They also function in ways like city or county governments in that they are charged with maintenance and upkeep of what could be termed the "infrastructure" within the community, often responsible for the maintenance of streets, parks, lighting and slopes. They also, in limited circumstances, have been analogized to landlords required to address limited safety concerns of the residents within the community. Given the different functions community associations serve, the courts have developed different ways of evaluating the conduct of an association depending on the function the association is performing in the case at issue. At least one court has determined that the enforcement of a view

restriction falls within the "corporate" function of the association, stating:

> Courts analyze homeowner associations in different ways, depending on the function the association is fulfilling under the facts of each case. Courts have treated associations as landlords (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499–501, 229 Cal.Rptr. 456, 723 P.2d 573 [association could be held liable for rape and robbery of individual owner who was not allowed to install additional lighting at time of crime wave]), minigovernments (*Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844, 182 Cal.Rptr. 813 [gated community could not discriminate among give-away newspapers]; businesses (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796, 191 Cal.Rptr. 320, 662 P.2d 427 [condominium project with age restrictions in CC & Rs was "business" within meaning of Unruh Civil Rights Act]) and corporations (*Beehan v. Lido Isle Community Assn., supra,* 70 Cal.App.3d 858, 865–867, 137 Cal.Rptr. 528 [board of directors' good faith refusal to take action against construction of house in arguable contravention of setback restrictions was protected by corporate business judgment rule]).

> The nature of the present case invokes the "corporate" function of the association. Of the four cases just cited, *Beehan,* which applied corporate law, is the one most similar to this, involving, as it did, a dispute between two neighbors over what sort of construction was allowable under recorded land use restrictions. Moreover, corporate principles also make the most sense in this case. The homeowner association is not acting as a business seeking a profit, a landlord exercising management over tangible property, or a minigovernment physically controlling access to its "citizen's" property. The homeowner association here is incorporated, but is torn between competing factions as to what *collective* action to take. Corporate law provides a ready framework for this problem.

Duffey v. Superior Court (1992) 3 Cal. App. 4th 425, 428–29.

As was the case in *Duffey*, where the matter at issue was whether the construction of patio cover in the rear yard of one owner would obstruct the view of another owner, Appellant here is "torn between competing factions as to what collective action to take." Does it find there is an interference with a view, or not? How does it determine what is a sufficient obstruction of a view

to warrant enforcement of the CC&Rs as "interference" with the view? As was the case in *Duffey*, corporate law provides a ready framework for the instant court to consider. As the California Supreme Court has stated, "[The Declaration] does not specify *how* the Association is to act, just that it should." *Lamden .v. La Jolla Shores Clubdominium Homeowners Association* (1999) 21 Cal.4th 249, 270 (emphasis in original). According to the *Lamden* court's interpretation of the CC&Rs, Appellant here was obligated to act. And as was the case in *Lamden*, the CC&Rs here do not provide any guidance as to *how* Appellant should act, just that it should. Thus, the rule of judicial deference is equally appropriate here as it was in *Lamden*.

Based on the California Supreme Court's adoption of the judicial deference rule for community associations, courts will generally uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with the public policy. *Watts v. Oak Shores Community Association (2015) 235* Cal.App.4th *466; citing Lamden v. La Jolla*

Shores Clubdominium Homeowners Association (1999) 21 Cal.4th 249.

While it may be argued that the decision in *Lamden* to defer to the decision of the board of directors was limited to issues of maintenance, courts have applied the rule of judicial deference in other contexts as well. As the court in *Watts* held:

> It is true the facts in *Lamden* involve the association board's decision to treat termites locally rather than fumigate. But nothing in *Lamden* limits judicial deference to maintenance decisions. Common interest developments are best operated by the board of directors, not the courts.

Watts v. Oak Shores Community Association (2015) 235 Cal.App.4th 466, 473.

The rule of judicial deference was also applied by the Court in *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, where a group of homeowners sued their associations' board for deciding not to pursue a derivative action after they gave homeowners' money to a political campaign. Considering the matter, the court held that in light of the fact that the action was not ultra vires or

illegal, the rule of judicial deference applied to the board's decision to not file the sought after derivative action.

In addition, as pointed out by Appellant, judicial deference has been given to an association's decision to allow unit owners exclusive use of otherwise inaccessible portions of common areas (*Harvey v. Landing Homeowners Ass'n* (2008) 162 Cal.App.4th 809, 821-822), and to architectural decisions (*Dolan-King* v. *Rancho Santa Fe Association* (2000) 81 Cal.App.4th 965, 978-979).

Lastly, adopting a rule of judicial deference in view cases will not vest a board of directors with unilateral, unfettered authority to grant or deny views where the association's documents call for some view protection. The board's decision and actions will still be subject to judicial scrutiny to ensure that the decision is within the authority of the board, is made in good faith, following a reasonable investigation. Only in such cases where that standard is met will court uphold the Board's decision.

b. Where view restriction language is open to interpretation, a standard of reasonableness should be adopted.

One of the most common types of restrictions in a set of CC&Rs is a restriction imposed to protect the views or to provide privacy from overlooking structures. In construing such restrictions, the court examines the objective intent of a reasonable person in light of the objectives to be achieved by the restriction in order to determine what would be contemplated by a reasonable person who contracted in reference to the restriction. 6 Miller & Star, *Cal. Real Est*. § 16:23 (4th ed.)

Restrictions often limit the right of property owners to build improvements, to install landscaping, or add other features to their property which restrict the view of other owners in the tract. Such restrictions are only enforceable if they are fair and reasonable in order to protect the enjoyment of property owners within the development. *Seligman v. Tucker*, (1970) 6 Cal.App.3d 691, 693.

In *Seligman*, the court was faced with interpreting a typically vague restriction designed to protect one owner's view. The relevant language at issue in the matter was simply "No …

structure shall be … erected …upon any lot in such location or in such height as to unreasonably obstruct the view from any other lot." *Seligman v. Tucker* (1970) 6 Cal.App.3d 691, 693. Finding that the language at issue gave no particular direction as to what "unreasonably obstruct" meant, the court stated:

> The term 'unreasonably obstruct' is to be applied to this view factor, and it is in this aspect wherein it must be determined whether or not the term is too vague or uncertain to allow the restriction to be enforced. Concededly, the restrictions contain no specific type of standard as to how much obstruction is not to be tolerated, such as a given percentage of the originally available view. The guide is simply not to be unreasonable. The validity of this gauge should depend on whether persons who become involved could be expected to have a general concept of what would be unreasonable and upon whether courts could, and would, undertake to make findings on the point as given cases are brought up for ruling.

Given this standard, it is impractical to require that any obstruction at all be addressed by Appellant as "interfering" with Respondent's view. Rather, the court may infer that the word "unreasonably" should be read into the relevant language at issue

so that, in application, the relevant section is read as "[n]o trees, hedges or other plant materials shall be so located or allowed to reach a size or height which shall ***unreasonably*** interfere with the view from any Lot and, in the event such trees, hedges or other plant materials do reach a height which interferes with the view from another Lot, then the Owner thereof shall cause such tree(s), hedge(s) or other plant material(s) to be trimmed or removed as necessary." This is the exact approach adopted by the court in *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 629, where the court held:

> However, it is not reasonable to interpret the CC&Rs as prohibiting any obstruction of existing views as urged by appellants. We agree with the trial court's observation that it would have been impractical for the original drafters of the CC&Rs to have intended that no house be built which obstructed any other owner's view. Thus, we conclude it would be in keeping with the intent of the drafters of the CC&Rs to read into Paragraph 11 a provision that the view may not be unreasonably obstructed, thus the sentence would read, "may at present or in the future unreasonably obstruct the view from any other lot." (Change underlined.)

c. Failure to grant deference to the decision reached by a board of directors can lead to absurd and inequitable results.

This case arises out of Lingenbrink's repeated demand that the Association compel his neighbor, Douglas Pardee, Sr., to trim and/or remove trees on his property based on Lingenbrink's contention that the trees "obstructed" the view from his property. (2 AA 184, 186, 189, 195-196) However, Pardee, the "offending" owner, is not a party to this action, and not within the jurisdiction of the Court. Thus, if the trial court's judgment is to stand, a separate action may have to be brought by Appellant to attempt to enforce the CC&Rs against Pardee to satisfy the orders of the trial court. This is not a unique situation to this particular case. One can see the result in any case where the offending owner is not a party to an action, as is the case here. And in such cases, failure to defer to the decision of the Association's board of directors can potentially lead to an absurd result.

It is not difficult to imagine the next phase of this litigation if the trial court's decision is upheld. Appellant will be required to take steps to enforce the CC&Rs against Pardee. In light of the

court's order to enforce the CC&Rs, if Pardee refuses to remove the alleged interference with Respondent's view the Association will be faced with having to file suit to seek a court order to compel the clearing of the view. Where an association has investigated a complaint of an interference with a view, and found that there is no unreasonable interference but loses at trial in an action brought by the complaining owner, one can imagine the testimony at a subsequent trial against the offending owner when the directors of the association are questioned. It is not hard to imagine the following line of questioning:

Q: Did you investigate to determine if there is any unreasonable interference with a view?

A: Yes

Q: Did you find that there was an unreasonable interference with a view?

A: No, we did not

Q: But you are now seeking to enforce the CC&Rs on the basis that there is an interference with the view?

A: Yes

Q: Has there been any change in the interference with the view since the time of your investigation?

A: No

Given that likely line of questioning, it is difficult to see how a court would find in favor of the association. In this case, the trial court's ruling will lead to an absurd result if the Association is forced to initiate legal action against Pardee.

Appellant is already facing a significant attorney fee award in this matter. Should the court not adopt a rule of deference, similar associations would not only face the potential for a significant attorney fee award in the underlying suit, but also incur fees and costs in prosecuting the offending owner in a matter where the evidence will exist to undermine the association's case. Should the association lose the case against the offending owner, it will then also face liability for that owner's attorney's fees and costs. Such a result is not only absurd, it is simply inequitable. Such a result is to be avoided. *Battram v. Emerald Bay Community Ass'n* (1984) 157 Cal.App.3d 1184, 1189 (Court should avoid an interpretation which will

make the CC&Rs extraordinary, harsh, unjust, inequitable or which would result in absurdity.).

Further, adopting a rule of judicial deference in view cases will not leave the complaining owner without a remedy and at the whims of the association. Not only must the association fulfill the requirements to be given deference[1], but the where the association has determined that it does not reasonably find that any interference with the view, the complaining owner has the right to enforce the CC&Rs directly against the complaining owner. (Civil Code section 5975). In such circumstances, the absurdity of the association being required to enforce the CC&Rs where it did not find a violation is avoided.

d. Deference should be given to a Board's interpretation of the view preservation provision even if it is acting in its "minigovernmental" capacity.

The Association, a corporation, may also be viewed in effect as "a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal

[1] Again, those elements are acting within the scope of its authority, in good faith, upon reasonable investigation, and in the best interest of the community as a whole. (*Lamden, supra,* 21 Cal.4th at 265)

government (many of which are "municipal corporations"). *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844. Covenants, conditions, and restrictions in the CC&Rs and Rules promulgated by an association are similar in form and function to statutory provisions imposed by governmental bodies. The Association also provides security services and various forms of communication within the community. Moreover, there is a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors which is clearly analogous to the governing body of a municipality. *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 651; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475; *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 922.

When serving its members in the discharge of its obligations to enforce the view preservation provisions of the CC&Rs, the Association's Board acts as an administrative agency in the same way a municipal corporation's enforcement agency

serves a city's constituents. As such, the board's interpretation should be accorded great respect by the courts. When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will ordinarily be followed if not clearly erroneous. *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 850.

This rule of "administrative interpretation deference" should be applied by a court in its review of interpretations of the CC&Rs by the board of an association of the view preservation provisions of the CC&Rs when the board considers enforcement of those provisions. Therefore, the Court should follow the board's interpretation unless it is clearly erroneous, not only under the doctrines of Corporate Business Judgment, and Judicial Deference, but under the Administrative Interpretation Deference doctrine.

Thus, whether the court adopts the view that Appellant and other similarly situated Associations are fulfilling their corporate functions, or whether they are fulfilling their

quasigovernmental functions, the courts should defer to the Association's decision.

4. CONCLUSION

Accordingly, CAI respectfully requests that this Court overturn the trial court's ruling and adopt a rule of judicial deference in cases of view restriction interpretation.

Dated: December 19, 2016

Respectfully submitted,

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By: 

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the text of this Appellant's Opening Brief consists of 3,462 words as counted by the word processing program (Microsoft Word) used to generate the brief.

Dated: December 19, 2016

Respectfully submitted,

NORDBERG|DeNICHILO, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within action. My business address is 4000 Barranca Parkway, Suite 250, Irvine CA 92604.

2. I certify that I electronically filed the foregoing APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT & AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT by using the appellate True Filing system on December 19, 2016.

3. I certify that all participants in this case are registered True filing users and that service on all parties will be accomplished by the appellate True filing system.

4. I certify that service on the San Diego Superior Court was accomplished via electronic service filing in the matter with the San Diego Superior Court via One Legal on December 19, 2016.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on December 19, 2016, at Irvine, California.

Robert M. DeNichilo